

A
DIGEST

LEARNED HAND,
ALBANY, N. Y.

OF THE

Laws of England.

BY

THE RIGHT HONOURABLE

SIR JOHN COMYNS, KNT.

LATE LORD CHIEF BARON OF HIS MAJESTY'S
COURT OF EXCHEQUER.

THE FOURTH EDITION,

CONSIDERABLY ENLARGED, AND CONTINUED DOWN TO
THE PRESENT TIME,

By STEWART KYD,

BARRISTER AT LAW,

OF THE MIDDLE TEMPLE, ESQ.

IN SIX VOLUMES.

VOL. I.


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 *The Binder is to place the Quarter Sheet in Signature K, Vol. I. opposite Page 141.*

APR 29 1915

P R E F A C E.

THE professors of the law have been long in expectation of seeing this work. Many reasons, not necessary to be mentioned, have hitherto delayed the publication of it. It now makes its appearance; and its merit is submitted to the consideration of the Public, whose candid and favourable acceptance of it is requested, in compliment to the able, learned, and reverend Author, and may reasonably be expected, as in some measure due to the nature and excellence of the performance.

The whole of this laborious work, is the result of many years application of the learned Judge whose name it bears; a name which did honour to the law whilst he lived, and which posterity may well revere with gratitude, as from him it will derive the benefit of so valuable and useful a book.

The general plan of this DIGEST is, that the Author lays down principles or positions of law, and illustrates them by instances, which he supports by authorities; and these are branched out and divided into consequential positions, or points of doctrine, illustrated and supported in the same manner. By this means, each head or title exhibits a progressive argument upon the subject, and one paragraph, (and in like manner one division or subdivision, &c.) follows another in a natural and successive order, till the subject is exhausted.

It is likewise so disposed, that even the titles only of these divisions and subdivisions, and of their several branches, (described and enumerated by letters and
VOL. I. A figures,)

figures,) being selected from the page or margin, do of themselves disclose, in orderly succession, the several links of the chain of argument contained in the body of the work; as may be seen, at one view, by having recourse to the INDEX, which contains a transcript of those divisions, &c. so selected and extracted.

As the Author pursues each head or title through its various branches, it consequently follows, that he must include many titles which happen to be subordinate to his general head, (and therefore, with the strictest propriety, come in as a division, or subdivision of it,) and yet, at the same time, are worthy of being considered as general heads of themselves, and such as a reader would, without question, search for as general heads in the INDEX: in which search he will not be disappointed; for wherever that happens, he will always find a reference to the head or title in which it is contained.

An instance or two of this will be sufficient to explain it.

In the very first title, *Abatement*, Misnomer, (which a reader might expect to find as a general head under letter M) is introduced in a subdivision, as cause for a plea in abatement, in (E. 18, &c.) and (F. 17, &c.)

In like manner, Addition, (which a reader would look for as a general head) is to be found as the branch of a subdivision in *Abatement*, (F. 22, &c.)

To make only one remark more on this circumstance;—Let it be observed, that the Crown Law, in general, will be found to be contained, for the most part, in the divisions and subdivisions of the titles *Justices* and *Justices of Peace*.

The Author has been exceedingly clear and perspicuous, and, at the same time, remarkably concise and exact in his quotations, and in his references to books; and as there are one or two books to which he is particular in his manner of referring, it may not be amiss to apprise the reader of it here, though he will find it mentioned in the page of Explanations.

Roll's Abridgment he always cites thus, 1 *Roll.* 300. l. 5. or l. 15. or l. 25; or thus, 1 *Roll.* 300. A. or B. or C. referring to it, not by the *placita*, but by the line, or the division.

Roll's Reports is thus quoted, 1 *Roll.* 300.—So that he avoids the distinguishing the Report from the Abridgment by the denomination of the one or the other, and yet the reader can never be at a loss to know which book he means:

If

If *l.* for line, or a single letter follows the number of the page, it is the *Abridgment*; if nothing follows, it is the *Report*.

So if Croke's Reports:—*Cro. Jac.* is always cited 2 *Cro.* but the other two volumes are quoted *Cro. El.* and *Cro. Car.* and not 1 *Cro.* and 3 *Cro.*—The Reason of this seems to be, that if they were cited 1 *Cro.* and 3 *Cro.* the reader would be uncertain which was meant, for it happened that *Cro. Car.* was in fact published before *Cro. El.* and therefore might be called 1 *Cro.* in point of priority, though it is really 3 *Cro.* in point of chronology, and is accordingly in some law-books called 1 *Cro.* which might occasion much confusion.—If it should be objected, that the Author might as well have called the other volume *Cro. Jac.* and the difficulty would have been avoided; the answer is, that he has not done so; and these instances are only mentioned to shew his particular manner of referring, and to observe his exactness in adhering uniformly to the same manner throughout.

In some places, though not many, he lays down his law and gives an instance, but does not refer to any authority in support of it. Why that was omitted, cannot with any certainty now be known: but may it not be looked upon as his own opinion upon the subject, even if there should be no other authority? And shall not the opinion of a learned and able man, presiding at the head of one of the chief courts of law and equity in the kingdom, have its proper weight?

It must be confessed, this work is not printed *exactly* in the same manner, in which it appears in the manuscript. Some alterations and additions have been made in it; which the Editors flatter themselves will not, when considered, afford any cause of complaint.

The first alteration is the translating the whole work from French to English. What was the Author's particular reason for compiling it in French does not appear: the fashion of the time might lead him to it at first, when perhaps it was more usual (before the act of parliament for reducing the law into English) for gentlemen of the profession to write their observations and collections in that language; and this fell in with his favourite scheme of conciseness, as the Law-French admits of a great number of abbreviations and contractions; and besides that, it saved time and labour in copying or extracting from books, which was more easily and readily done by following the language and abbreviations of the book cited, which

were commonly (the ancient books especially) printed in French, than by taking the trouble to translate them: and having done so with many books, he continued the same language in extracting from others, though they were printed in English, that his quotations from them might appear uniform, agreeable to another of his favourite schemes. The acts of parliament are an exception to this uniformity of language, for these being the law itself, and not the opinions or resolutions of courts or judges, declaring or explaining the law, he seems to have paid a particular and due regard to them, by transcribing them in the original language in which they were printed, whether French, Latin, or English.

The Editors however, for the rendering this book more extensively useful, have chosen, that it should make its public appearance in *English*: by which means, not only gentlemen of the profession, but all other persons may have the benefit of it; and, in particular, those worthy and public-spirited men, who, though not bred to the study of the laws, are most honourably and deservedly intrusted with the care and execution of a great part of them, and to whom therefore, the conveying some knowledge, or at least directing them where to furnish themselves with it, may not be useless.

It may by these means also instruct all persons in general, (who are neither bred to the profession, or intrusted with the execution of the laws, and are nevertheless bound to obey them) how to conduct themselves, so as not to suffer any injury by the breach of them, either in themselves or others.

The translation of the book has been carefully compared with, and corrected by the original, and (with very great labour) has also been compared with and corrected by the several books cited: for, though a most remarkable attention has been paid to the exactness of the quotations throughout, yet the multiplicity of references, in so voluminous a work, seems to entitle the author to some excuse, if in a few, very few instances, the quotation and the book have not precisely agreed; and wherever that has been the case, a liberty has been taken to make this work submit to such an alteration as has made it correspond with the book cited; and in this the reader cannot be misled, for by applying to the book itself, he may see how far that is warranted.——This is the second kind of alteration.

Another

P R E F A C E.

Another circumstance may more properly be termed an addition, than an alteration : for, when recourse has been had to books cited, in order to compare the quotations with them, it has sometimes happened, that a case or authority has been discovered, warranting a position or point of law, mentioned by the Author, without his having cited any book to support it ; and wherever this has happened, a reference has been made to the case or authority so discovered.

A like liberty is, in sometimes adding references to contemporary reporters of the same case, or consistent and concurring Authors elucidating the same point, which in the course of the examination have been met with, and were not cited in the original.

The Editors are not aware, that any objection can arise to the reader, who will in some places find references to the volume of Lord Chief Baron COMYNS's Reports, which, not being printed till after his death, could not be referred to by him in his life-time by the printed page. The freedom has certainly been taken of adding some references of this kind, and the candid reader will, it is hoped, think he is not injured by it : it has furnished him with an authority, where perhaps even the Author's manuscript Report has not been cited, but only a case mentioned by him by the name and term, or which, if cited, was by the page of his manuscript, and therefore of no use as to the printed Report ; and it also helps him to an additional authority, where the same case has been reported by others.

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A farther alteration is, in the disposition of the general heads or titles, which, though in the original disposed in a general alphabetical order, are not so critically successive as a reader might perhaps expect to find them. This, as it created no confusion, (each head or title being a detached and separate subject by itself) is now changed, and the general heads or titles follow each other in an exact and regular alphabetical succession.

To avoid confusion also, these general heads or titles are preserved by the French names, as in the original, and each of them stands in the alphabetical station in which the French name places it : but the reader, when he is looking in the INDEX for such a title by its English name, will
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always find it there specified, with a reference to it by its French appellation.

It may not be amiss in this place to say, that some general heads or titles, which happen to intervene in this alphabetical disposition, and which are not treated as titles by themselves, but in the divisions or subdivisions of other titles, (as has been before taken notice of) are here inserted, and referred to the title in which they are so taken in; and this, in a great many instances not remarked in the original: and to attain this useful end, the divisions, subdivisions, and branches throughout the work have, with extraordinary pains, been, as it were, dissected, to furnish such an arrangement with propriety and exactness—This is also an addition to the work.

Another addition is this—The divisions, subdivisions, and their several branches, (which were made and disposed by the Author himself) are now, for the purpose of referring from one part of the work to another, denominated and described by letters and figures, in this manner:—The first division of a general head or title is marked with the letter (A.) the second division with the letter (B.) and so on, without proceeding to figures, if it is not subdivided. When either of these divisions has one or more subdivisions, those are marked by adding figures to the letter, as (A. 1.) (A. 2.) &c. or (B. 1.) (B. 2.) &c. When again any of these subdivisions are branched out into farther distributions, those are described by the continued progression of the figures, and are contained in the margin of the book: and when a subdivision has run out its whole length, the next subdivision is taken up in the body of the page, by the *reigning* letter (if one may so call it) of the division, and the next succeeding figure to that last specified in the margin. The whole division being finished, a new division begins with a new letter, and runs on in the same manner according to the several distributions of it. When the alphabet is exhausted, it begins again with a second rotation of it (2 A.) (2 B.) &c. and when it is to describe subdivisions, &c. the denominating figures are added, as (2 A. 1.) (2 A. 2.) &c. or (2 B. 1.) (2 B. 2.) &c. So the next time the alphabet is repeated, it is (3 A.) (3 B.) and afterwards (4 A.) (4 B.) &c. and so on, with the denominating figures as above, whenever their assistance is wanted.

The reader is now apprized of the nature of this Great Work; the method in which it is conducted; the means whereby recourse may be had to any part of it; and the alterations

alterations and additions which have been made in it, which he observes are only such as tend to make it of more real use, and such as relate to its form and appearance in print; for as to the substantial part, the Work itself, nothing is inserted or introduced there, but what is of the Author's own compiling, (the original of which is all written with his own hand) except in the instances before mentioned, of the translation, and of the conformity to the books cited.

* *N. B.* In the last edition, the additions are distinguished from the original by being inclosed between crotchets, thus; []. In the present they are distinguished in the same manner: The additions by the present Editor are distinguished by being inclosed between asterisks, thus; * *

The few notes that are to be found in this edition are by the present Editor.*

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

IN WHICH ARE CONTAINED THE
MOST IMPORTANT PASSES OF HIS
Majesties LIFE AND REIGN
FROM HIS MARRIAGE TO HIS DEATH

BY SAMUEL JOHNSON
OF ST. JAMES'S PLACE
IN THE CITY OF LONDON
PRINTED BY A. MILLAR, IN ST. JAMES'S PLACE
IN THE CITY OF LONDON

EXPLANATIONS.

A.

<i>Abr. Ca.</i>	Abridgment of Cases in Equity.
<i>Acc. or Ag. or Agr.</i>	Accord, or Agreed.
<i>Adj.</i>	Adjudged; sometimes Adjourned.
<i>Adm.</i>	Admitted.
<i>Ante and Post.</i>	References to Divisions and Subdivisions of the same Title.
<i>App. H. Jer.</i>	See Falle's Account of Jersey, (printed 1694,) chap. 1. p. 5.—chap. 3. p. 89, 97, 98.—chap. 4. p. 102.—chap. 7. p. 201, &c. King John's Constitutions.
<i>Arg. 1 Ch. R.</i>	Argument in 1 Chancery Reports on the Jurisdiction of the Chancery.
<i>Aff.</i>	Liber Affisarum. The References by Placita.
<i>Ast. Ent.</i>	Aston's Entries.
<i>Ayl. Int.</i>	Ayliffe's Introduction to his Parergon. Edit. 1726.
<i>Ayl. or Ayl. Hist. or Dr. Ayliff.</i>	} Ayliffe's ancient and present State of the University of Oxford.

B.

<i>B. or C. B.</i>	Common Bench, or Common Pleas.
<i>B. R.</i>	King's Bench.
<i>B. Tr.</i>	Bishop's Trial.
<i>Bac. H. 7.</i>	Lord Bacon's Life of H. 7.
<i>Bend.</i>	Benloe's Reports; sometimes referred to by <i>Placitum</i> , sometimes by <i>Page</i> ; when the former, it has <i>pl.</i> before the figure.
<i>Bl. or Bl. Nom. or Blo. Nom.</i>	} Blount's Law Dictionary.
<i>Bo. R. AB.</i>	
<i>Br. Jad.</i>	Booth of Real Actions.
	Brownlow's Brevia Judicialia. Edit. 1662.
<i>Bra. Treat. de Burghs.</i>	Dr. Brady's Historical Treatise of Cities and Boroughs.
<i>Brad. or Bra.</i>	Dr. Brady's compleat History of England. Fol. Edit. 1685.
<i>Bro.</i>	Brooke's Abridgment.
<i>Bro. Ent. or Brow. Ent.</i>	Brown's Entries.
<i>Bro. R.</i>	Brownlow Redivivus.
<i>Bro. V. M. or Bro. Vad.</i>	Brown's Vade Mecum.

Brownl.

EXPLANATIONS.

<i>Brownl. or 1 & 2 Brow.</i>	Brownlow's Reports.
<i>Brownl. Ent.</i>	Brownlow's Entries.
<i>Bur. H.</i>	Burnett's History of the Reformation.
<i>B. R. H.</i>	Cases in the King's Bench in the Time of Lord <i>Hardwicke</i> .
<i>B. M.</i>	<i>Burrow's</i> Reports in the Time of Lord <i>Mansfield</i> .
<i>B. S. C.</i>	<i>Burrow's</i> Settlement Cases.
C.	
<i>C. B.</i>	Common Bench, or Common Pleas.
<i>Ca. Ch.</i>	Cases in Chancery. Edit. 1735.
3 <i>Ca. Ch.</i>	3d Vol. of Cases in Chancery, or Select Cases in Chancery; contains the <i>D. of Norf.</i> Case.
<i>Ca. Eq.</i>	Gilbert's Reports of Cases in Equity.
<i>Cal.</i>	Callis on Sewers. 4to. 1686.
<i>Ca. Pa. or Ca. Parl.</i>	Cases in Parliament.
<i>Cart.</i>	Carter's Reports.
<i>Carth.</i>	Carthew's Reports.
<i>Chil.</i>	Chillingworth.
1, 2, & 3 <i>Ch. R.</i>	Reports of Cases in Chancery in the Reigns of K. <i>Charles 1st. &c.</i> examined with the third Edit. <i>Folio</i> 1736, by the Pages of the <i>Octavo</i> Edit. which are there preserved in the Margin. [Note, 1 <i>Ch. R.</i> contains the <i>Earl of Oxford's Case</i> , and the <i>Argument on the Jurisdiction of the Chancery</i> , which last is described by <i>Arg. 1 Ch. R.</i>]
<i>Ch. R.</i> without a preceding Figure.	} Chancery Reports, <i>tempore</i> Finch.
<i>Cl. Ass.</i>	Clerk's Assistant.
<i>Clift.</i>	Clift's Entries.
<i>Cod. or Cod. Ju. Eccl.</i>	Gibson's Codex.
<i>Comp. Att. or C. Att.</i>	Complete Attorney. Edition 1676 or 1695.
<i>C. Sol. or Comp. Sol.</i>	Complete Solicitor. 1695.
<i>Const. Oth.</i>	Constitutiones Othoni at the End of Lyndwood's Provinciale.
<i>Cont.</i>	Contra.
<i>Cot. Abr.</i>	Sir Robert Cotton's Abridgment of the Records.
<i>Cot. Ab. Pref.</i>	Preface to the above.
<i>Crompt. Off. of Sheriff.</i>	} Fitzherbert's Offices of Justices of Peace, &c. enlarged by Richard Crompton.
<i>Crompt. or Crompt. Just.</i>	
<i>C. i. T.</i>	Cases in the Time of Lord <i>Talbot</i> .
	D.

- D.**
- D.* Dictum.—Sometimes a Letter of R e-
ference to a Book.
- Pr. Ch.* Duke of Norfolk's Case in 3 Cases in
Chancery, or Select Cases in Chan-
cery.
- D. of Norf.*
- D. of Pl. or D. of } A Defence of Pluralities. 8vo. 1692.*
Pluralities.
- D. & St.* Doctor and Student.
- Dal.* Dallison's Reports.
- Dalt.* Dalton's Justice. Edit. 1727.
- Dalt. Sh.* Dalton's Office of Sheriff.
- Dan.* Danvers's Abridgment.
- De Jure M.* Molloy de Jure Maritimo. 3d Edit.
1682, or 5th Edit. 1701.
- Degs.* Degge's Parson's Counsellor, Edit.
1703.
- D'Ew. or D'Ewes.* Sir Simon D'Ewe's Journal.
- Dod. Nob.* Honour's Pedigree, or the several
Fountains of Gentry, &c. by Sir
John Doderidge. 1657.
- Dub.* Dubitatur.
- Dugd. O. J. or Or. J. } Dugdale's Origines Juridiciales.*
or Jud.
- Dugd. Sum.* Dugdale's Summons to Parliament.
- Duke.* Duke's Law of Charitable Uses.
- Dy.* Dyer's Reports. Edit. 1688.
- E.**
- Eq. Ab. or Eq. Abr. or } Abridgment of Cases in Equity.*
Eq. Ca. Ab.
- Eq. Ca. or Eq. R.* Gilbert's Reports of Cases in Equity,
2d Edit.
- Eq. Ca.* Sometimes Gilbert's as above.—Some-
times the Second or Equity Part of
2 *Mod. Ca.* (Modern Cases in Law
and Equity;) but when the latter is
meant, it is marked in the margin.
- E. of Cov.* Earl of Coventry's Case at the End of
Francis's Maxims of Equity.
- E. of Oxford.* Earl of Oxford's Case, 1 *Ch. R.*
- Essay for Amendment of } By William Lowndes. 1695.*
the Coin.
- F.**
- F. N. B.* Fitzherbert's Natura Brevium. The
Pages according to the old Editions.
- F.g. or Fitzg.* Fitz-Gibbon's Reports.
- Fl.* Fleta.
- Finch. Ch. R.* Chancery Reports tempore Finch.
- Fitz. or F.* Fitzherbert's Abridgment.
- Forst.* Forster's Digest of the Laws relating
to the Customs, &c.

EXPLANATIONS.

- Fort.* Fortescue de Laudibus Legum Angliæ.
Fox M. Fox's Martyrology.
Fran. or Fra. Francis's Maxims of Equity.
Fra. E. of Cov. Earl of Coventry's Case at the End of Francis's Maxims of Equity.
- G.
- G. 2. with a Figure preceding, or Temp. G. 2.* } Reports of Cases in Chancery and the King's Bench, in the 4th, 5th, 6th, and 7th Years of K. Geo. 2d.
Godb. Godbolt's Reports.
Gol. or Goldf. Gouldsborough's Reports.
Gro. de j. b. & p. Grotius de Jure Belli & Pacis.
- H.
- H. I. P. or Ha. I. P. or Hal. I. P. or H. Parl. or Ha. Parl.* } Sir Matthew Hale's Original Institution, Power, and Jurisdiction of Parliaments.
Hale Sheriff's Accounts. Sir Matthew Hale's Treatise of Sheriff's Accounts. Edit. 1683.
H. P. C. or H. Hale's Pleas of the Crown. 8vo.
Han. Ent. Hansard's Entries.
Hanf^r. Introd. or Int. or Han. Int. } Hansard's Introduction to his Book of Entries.
Hard. Hardres.
Hist. de C. L. Hale's History of the Common Law.
- J.
- Jan. Angl.* Jani Anglorum Facies nova.
Jen. (S. L.) Sir Leoline Jenkins. (The References are to his Argument on the Jurisdiction of the Admiralty, and his Charges at the Admiralty Sessions.)
Jenk. Jenkins's Centuries.
Infra and Supra. References to the same Division or Subdivision.
Jon. Sir William Jones's Reports.
2 Jon. Sir Thomas Jones's Reports.
- K.
- Kel. or Keil.* Keilwey's Reports.
Kelg. Kelynge's Reports.
Ken. Imp. Kennet of Impropriations.
Kit. Kitchen of Courts. French Edition 1623.
- L.
- Lamb.* Lambard's Justice. Edit. 1607.
Lamb. Ch. or Lamb. Off. Ch. } Lambard's Duties of Constable, Churchwarden, &c. usually bound up with Lambard's Justice.
Lut. Ent. Lutwyche's Entries.
- Lind.*

EXPLANATIONS.

xiii

<i>Lind. or Lind. Off. Arch.</i>	Lyndwood's Provinciale. Edition 1679.
<i>Lit.</i>	Littleton's Reports.
<i>Lit. with S.</i>	Littleton's Tenures; S. for Section.
M.	
<i>Ma.</i>	Malyne's Lex Mercatoria. Folio Edition, 1686.
<i>Mad.</i>	Madox's History of the Exchequer.
<i>Mad. Form.</i>	Madox's Formulæ Anglicanum; refers to the N. of the Formula.
<i>Mad. Form. Int.</i>	The Dissertation prefixed to Madox's Formulæ Anglicanum; refers to the Page.
<i>Manw.</i>	Manwood's Forest Law. 3d Edition.
<i>Mar.</i>	March's Reports. When the Reference is marked <i>pl.</i> it is to the Placita; without that, to the Page.
<i>Mar'.</i>	Advice concerning Bills of Exchange, by Marius. Folio Edit. 1684.
<i>Mills.</i>	Rules and Orders of C. B. by Milles, printed 1732, or Edition 1729.
<i>Mod. Ca.</i>	6th Modern Reports.
<i>2 Mod. Ca.</i>	Modern Cases in Law and Equity. 1st Part.
<i>Mod. Int.</i>	Brown's Modus Inrandi.
<i>2 Mod. Int.</i>	Same Book. 2d Part.
<i>Moll. de Jur. M.</i>	Molloy de Jure Maritimo. 3d Edition 1682, or 5th Edition 1701.
<i>M. P. Ex.</i>	Modern Practice of the Court of Exchequer. 1731.
N.	
<i>N. N.</i>	Uncertain what Book this refers to.
<i>Nom. or Bl. or Bl. Nom. } or Blo. Nom.</i>	Blount's Law Dictionary.
O.	
<i>Off. Br.</i>	Officina Brevium.
<i>Off. Exr.</i>	Wentworth's Office of an Executor. Edition 1689.
<i>Ord. Cla.</i>	Lord Clarendon and Sir Harbottle Grimstone's Orders of the Court of Chancery.
<i>Ord. and Rules in Exch.</i>	Orders and Rules of the Court of Exchequer. Edit. 1729.
P.	
<i>P. W.</i>	Peere Williams's Reports.
<i>Perk.</i>	Perkins's profitable Book treating of the Laws of England.
<i>Pl. or Plo. or Pl. Com.</i>	Plowden's Commentaries.

Pcft

Post and Ante.

References to Divisions and Subdivisions of the same Title.

Pr. Ch.

Precedents in Chancery.

Pr. Lond. or Priv. Lond.

Privilegia Londini. 1st Edition.

*Pr. R. or Pr. Reg.**Pr. or Sti. Pr. Reg.*

} Style's Practical Register. 2d Edition,

Pr. St.

Private Statute.

*Pref. Cot. Abr.*The Preface to Sir Robert Cotton's
Abridgment of the Records.

Q.

*Quo. W. or Quo. Warr.*The Case of the *Quo Warranto* against
the City of London.

R.

R.

Resolved.

*Rast. Ab.*Rastal's Great Abridgment of the
Statutes.*Rast. Ent.*

Rastal's Entries.

Reg.

Registrum Brevium.

Reg. Jud.

Registrum Judiciale.

Reg. Or.

Registrum Brevium Originalium,

Reg. Pl.

Regula Placitandi.

Rob. Ent.

Robinson's Entries.

Roll. with l. or a Letter,
as *A.*} Roll's Abridgment; *l.* for Line;
Letter for Division.*Roll. without l. or Letter.*

Roll's Reports.

*Rules and Orders B. R.*Rules and Orders of the Court of
King's Bench. Edit. 1729.*Rules and Orders C. B.*Rules and Orders of the Court of
Common Pleas. Edit. 1729 or 1735,*Rules and Orders of the*
Court of Chancery.

} Edit. 1739.

*Rush. or Rushw.*Rushworth's Collections. Edit. 1659
or 1680.*Ry. F.*

Rymer's Fœdera.

S.

Sand.

Saunders's Reports.

Sand. Obs. on St. 22
Car. 2.} Saunders's Observations on the *St.*
22 Car. 2. 1. to suppress Con-
venticles.*Seld.*

Selden. Edit. 1726.

*Seld. de Dec.*Seldon's History of Tithes. 4to,
1618.*Seld. J. P. or Jud. Parl.*

Selden's Judicature of Parliament.

The Reference to the 3d Vol. is of
the Folio Edit. of Selden's Works
1726, in three Volumes, usually
bound in six.*Seld.*

EXPLANATIONS.

<i>Seld. Off. Ch. or Canc. }</i>	Selden's Discourse on the Office of Chancellor. Edit. 1726.
<i>or Chan.</i>	
<i>Seld. Mare Cl.</i>	Selden's Mare Clausum.
<i>Semb.</i>	Semble; seems.
<i>Sh. Acc.</i>	Sir Matthew Hale's Treatise of Sheriff's Accounts. Edit. 1683.
<i>Som.</i>	Somner of Gavelkind.
<i>Ld. Som. Arg'.</i>	Lord Somers's Argument on the Banker's Case.
<i>Spel. Gloss. or Sp. Gloss.</i>	Spelman's Glossary. 1st Edition 1626.
<i>St. Eccl. Cases.</i>	Stillington's Ecclesiastical Cases.
<i>St. or St. P. C. or Sta. }</i>	
<i>or Sta. P. C. or Stamf. }</i>	Staundford's Pleas of the Crown.
<i>P. C.</i>	
<i>St. Pra. R. or St. Pr.</i>	Staundford's Prærogativa Regis.
<i>Sti.</i>	Styles's Reports.
<i>Sti. Pr. Reg.</i>	Styles's Practical Register, 2d Edit.
<i>Supra and Infra.</i>	Reference to the same Division or Subdivision.
T.	
<i>Temp. G. 2.</i>	Reports of Cases in Chancery and the King's Bench, in the 4th, 5th, 6th, and 7th Years of King Geo. 2d.
<i>Th. Br.</i>	Theaurus Brevium.
<i>Th. D. or Th. Dig.</i>	Theolall's Digest.
<i>Tho. or Tho. Ent.</i>	Thompson's Entries.
<i>Tot.</i>	Tothill's Transactions of the High Court of Chancery. Edit. 1671.
<i>Townsh. J. or Townsh. }</i>	
<i>Jud. or T. Jud. }</i>	Townsend's 2d Book of Judgments.
<i>Tr. Eq.</i>	Treatise of Equity.
<i>1 Tr.</i>	State Trials compared with 2d Edit. 1730.
V.	
<i>Vad. M. or Bro. V. M.</i>	Brown's Vade Mecum.
<i>Vid. Ent.</i>	Vidian's Entries.
<i>Vid. Introd. or Vid. Int.</i>	Vidian's Introduction to his Book of Entries.
W.	
<i>W. 1.—W. 2.</i>	The Statutes of Westminster, 1st and 2d.
<i>Wat.</i>	Watson's Clergyman's Law, 8vo.
<i>Went. Off. Ex.</i>	Wentworth's Office of an Executor. Edition 1689.
<i>West. or West. Chan. or }</i>	
<i>West. Symb. }</i>	West's Symboleography of the Chancery, &c.
<i>Winch.</i>	Winch's Reports.
<i>Win. Ent.</i>	Winch's Entries. Edit. 1680.
<i>Wri. Int.</i>	Wright's Introduction to the Law of Tenures.

Y.

*Tear Books.*Compared with the Edition of 1679,
1680.

When the Page of a Book is included in a Parenthesis, thus, (466), that Page is twice numbered in the Book cited.

Quotations not above specified are such as are conceived to be obvious, and the References are, in general, to the common Editions of the Books.

ABATEMENT. (a)

(A) Abatement into Land.

ABATEMENT into land is; when a man dies seised, and another who has no right enters before the heir. *Co. Lit. 277. a.*

If the younger son enters before the eldest, it will be an abatement; though if he afterwards die seised, and the land descend to his issue, the descent does not take away the entry of the eldest son, because it shall be intended the younger son entered claiming as heir. *Lit. Sect. 396, 397.*

* For when a younger brother enters in this case, the law intends that he does not enter to obtain a possession distinct from that of the elder brother, but to preserve the possessions of the father in the family, that nobody else may abate. *Gilb. Ten. 24. See Discent (D).**

(B) Abatement of Writ.

ABATEMENT of writ or plaint is, when for any default the defendant prays that the writ or plaint do abate, viz. cease against him for that time. *Co. Lit. 134. b. 277. a.*

A plea shall be in abatement, or in bar.

A plea in bar is a plea in chief.

And therefore if a rule be, that judgment shall be entered, unless the tenant or defendant plead in chief, he cannot vouch. *Per 2 Judges, Weston J. contra. Dal. 68.*

(C) The Order of Plea in Abatement.

THE order of pleading is, first to the jurisdiction of the court. *Co. Lit. 303. a.*

Then to the ability of the person impleading. *Co. Lit. 303. a.*

Then to the ability of the person to be impleaded. *Co. Lit. 303. a.*

After the appearance of the parties, and admittance of the jurisdiction, and of the ability of all the parties, the plaintiff or

(a) The word abatement has three different significations in the law; the two here given, and a third, the pulling down or removing a nuisance; for which see Action on the Case for a Nuisance (D. 4.)

demandant declares, and the defendant in order of pleading may demand oyer of the writ, and plead to the count, *viz.* variance between the count and the writ; or other record or specialty mentioned in it. *Co. Lit.* 303. a. *Tb. Dig.* l. 10. c. 1. *sect.* 5.

After plea to the count, the defendant may plead to the writ. *Co. Lit.* 303. a.

And first, matter that appears upon view of the writ. 3 *Ed.* 3. 30.

And matter appearing upon view of the writ ought to be pleaded in the order in which it lies, as first to the place, then that *contra pacem* is transposed, &c. 30 *Ed.* 3. 20.

After pleas appearing upon view of the writ, he shall plead in abatement of the writ, matter *dehors*, that abates it. 3 *Ed.* 3. 30. *Tb. Dig.* l. 10. c. 1. *f.* 6.

Lastly, he shall plead to the action *of the writ, by which he shall shew that the plaintiff is not entitled to the writ he has brought, but that he ought to have brought some other writ. Readings on the stat. cites 26 H. 8. *Bro. tit. Brief* 409. **Co. Lit.* 303. a.

If a man invert the order of pleading, he shall lose the benefit of the pleas omitted. *Co. Lit.* 303. a.

By *stat.* 4 & 5 *Ann.* c. 16. *sect.* 11. No dilatory plea shall be received in any Court of Record, unless the party by affidavit prove the truth of it, or shew some probable matter to induce the court to believe the fact is true.

(D) Plea to the Jurisdiction.

(D. 1.) Ancient Demesne.

TENANT or defendant may plead to the jurisdiction of the court, that the land is ancient demesne. 4 *Inst.* 269. *Rast. Ent.* 51. b. *Win. Ent.* 551.

[This plea must be verified by affidavit. *Hatch v. Cannon.* P. 10 G. 3. 3 *Will.* 51.]

In what actions this is a good plea, *Vide in Ancient Demesne*, (F. 5. 6.)

The plea will be good with, or without defence. R. 3 *Lev.* 182. 405. *Vide Post.* (J. 16.)

After special imparlance. *Vide Post.* (D. 9. J. 19, 20.)

The plea ought to say, that the land is held of such a manor, for it is not sufficient to say, that it is *de antiquo dominico* generally, without shewing of *what* manor it is held. *Sem.* 2 *Lev.* 190.

Of such a one, *ut de manerio suo*. *Semb.* for it is shewn as cause of demurrer. *Lev. Ent.* 195. But it is said, *tenentur de manerio*. *Win. Ent.* 551.

It ought to say *de antiquo dominico*, for *de dominico regis* is not sufficient. *Semb.* Dy. 373. b. *for the king may have domains which are not ancient demesne.*

It ought to say, that the land is ancient demesne, for, that it is parcel of the manor of D. which is ancient demesne, is not good. R. 1 *Sal.* 56. *for the manor may in general be ancient demesne, though parcel of it may not.*

But

But it is sufficient to say, that it is *placitabil' in cur' manerii per parvum breve de recto clauso*, or in *cur' manerii* generally, as well as in *cur' manerii coram ballivis & seſſatoribus ejusdem manerii*. Lut. 713.

It is not necessary to say, that it is held in socage, for that is intended. 2 Leo. 190.

So it is not necessary to say, *breve parvum* or *clausum*, for these words are not in the writ. Dy. 373. a.

To this plea, the plaintiff may reply, that the land is pleadable at common law, and traverse that the manor is ancient demesne. *Raft. Ent. 58. b. Sho. 271.*

Or without a traverse. *Vide Tho. Ent. 2.*

That it is copyhold parcel of the manor. 2 Cro. 559. * for the privilege extends only to the socage tenants. *

Or he may traverse, that the land in question is parcel of the manor. *R. Sho. 271.*

But he cannot reply, that it is pleadable at common law, and traverse that it is parcel *de antiquo dominico*. *R. Sho. 271.* * for though it be not parcel of ancient demesne, it may itself be ancient demesne. *

(D. 2.) Within a County Palatine.

So, that the land lies in a franchise *ubi breve domini regis non currit*; as within the county palatine of *Durham*.

Or in the county palatine of *Chester*. 4 *Inst. 212. Rob. Ent. 1. Bro. V. M. 473.*

So in personal actions, that the cause of action arises there, if it appears so by the declaration. 4 *Inst. 213. Vide Th. D. l. 11. c. 10. ſeſ. 4, 5. 5 Mod. 335.* * But though the cause of action for things transitory, in truth arose within the county palatine, yet, by the general rule of law, the plaintiff may alledge it in any county where he will, and the defendant cannot plead to the jurisdiction of the court, that the cause of action arose within the county palatine. 4 *Inst. 213. **

And he ought to aver, that the defendant is commorant there, and has lands there, whereby he may be summoned. 5 *Mod. 144. Carth. 355.*

And the plea need not be put in upon oath. *R. 5 Mod. 335.*

But it is no plea, that the land, &c. lies in a county palatine, when the action is sued against the judge there; as against the chamberlain of *Chester*, &c. 4 *Inst. 213.* Or against the earl of *Chester*. *Th. D. l. 11. c. 10. ſeſ. 1. 1 Rol. 374. l. 5. 4 Inst. 213.*

Or when the defendant lives out of a county palatine, so that the process there cannot extend to him. *R. 4 Inst. 213.*

So where a transitory thing is alledged out of a county palatine, it cannot be pleaded to the jurisdiction, that it was done there, as it may if it was alledged there. *R. 4 Inst. 213.*

Or when the king is party, as in *quare impedit*, for he shall implead in his own court. *Th. D. l. 11. c. 19 ſeſ. 2.*

(D. 3.) Within the *Cinque Ports*, &c.

Or within the *Cinque Ports*. *Mo.* 276. *Ths. D. l.* 11. c. 10. *sect.* 6, 7, 8. *Hutt.* 74. *Vide Off. Br.* 178. *Vide in Franchises*, (E. 1. &c.)

And the privilege of the *Cinque Ports* extends to actions real, personal, or mixed. 4 *Inst.* 424.

And though the land escheats to the king, the privilege remains. 4 *Inst.* 224.

So if part of the land demanded lies within the *Cinque Ports*, and part without, the whole writ abates. 4 *Inst.* 224.

But if there be an appeal in *B. R.* for an offence at *S.* in com' Cant', it is no plea, that *S.* is one of the *Cinque Ports ubi breve domina regina non currit*. *R. Tel.* 12. *Cro. Gar.* 247. 2 *Inst.* 557. *Cro. Eliz.* 910.

So it is no plea in ejectment for lands within the *Cinque Ports*, if the demise be alledged *dehors*. 1 *Sid.* 66.

So if it be for a trespass, or other transitory thing done within the *Cinque Ports* by any one not commorant there. *Tel.* 12. 2 *Inst.* 557.

So in any action that concerns the king, it is no plea that it is within the *Cinque Ports*; as in *quare impedit* by the king. *Cro. Eliz.* 911.

And the king may sue in what court he pleases. 12 *Co.* 61.

So it may be pleaded to the jurisdiction of the court, that the land lies in *Ireland*, or out of the realm. *R. Sho.* 191. 1 *Sal.* 80.

Vide post. (D. 5.)

(D. 4.) Privilege.

(D. 4.) So, that the defendant has privilege to be sued elsewhere; as
As peer. that he is a peer by the king's patent.

And he ought to shew his patent to the court. 1 *Sid.* 29. *R.* 6 *Co.* 53. b.

But if he is a peer by writ, he cannot plead this, but must shew his writ, and pray his privilege. 1 *Sid.* 29.

(D. 5.) That he is a baron of the *Cinque Ports*, and by letters patent
As baron of of *Ed.* 1. confirmed by *Queen Eliz.* ought to be impleaded
the *Cinque* there, and not elsewhere. *Off. Br.* 178. *Vide ante*, (D. 3.)
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But it shall not be allowed upon motion, without plea. *R. Sal.* 544.

* So, if an attorney be sued by *original* in the same court of which he is an attorney he may plead his privilege in abatement, *Doug.* 312. *Vid. Attorney*, (B. 17.) *

If he pleads privilege as an attorney, he may produce his writ of privilege or admission upon record, and conclude *prout patet per recordum*, and then the defendant cannot be denied to be an attorney. *R. Sal.* 545. *Skin.* 582.

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Or he may plead it without producing it, and then it may be denied. *R. Sal.* 545.

So if he claim as clerk, &c. to him who has a record for his privilege, for that is a fact. *Skin.* 582. 521.

That he is a philizer of *C. B.* *Tho. Ent.* 4.

A clerk in the exchequer. *Lut.* 44. *R. Mod. Ca.* 305.

That he is a fitting clerk in the exchequer, shall be tried by the record. *Kempfield v. Moore*, *M.* 11 G. 2. *Andr.* 44.

Or it may be allowed upon producing the *Liber Rubricus* of the exchequer. *Lut.* 46. *Sti.* 359. *Mod. Ca.* 305. *Jon.* 288.—Or by a *superfedeas* to *C. B.* otherwise to *B. R.* *R. Sal.* 546. *Vide Bro. Privilege* 25.—But not by writ of privilege from the exchequer. *Dy.* 328. 3 *Leo.* 223. *Vide Sal.* 546.

A tally-cutter and receiver in the exchequer. *Tho. Ent.* 3.

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But a new officer in the exchequer shall not have privilege, for his name is not in *Libro Rubrico*. *Jon.* 288, 9.

And privilege shall be allowed in an action *qui tam*, &c. *Sal.* 543.

That he is an attorney of *B. R.* to a suit in *C. B.* *Lut.* 639.

And it is not necessary to alledge, that he has clients there. *Lut.* 1666.

Nor shall he be sworn to the truth of his plea. *Mod. Ca.* 114. *Vide 5 Mod.* 335.

If defendant pleads that he is clerk to a prothonotary, he must swear to the truth of his plea. *Lance v. Thedam*, *T.* 7 G. *Fortescue* 341.

But it is not sufficient to swear that it is a true plea, for that may be evasive. *Onslow v. Booth*, *Fort.* 341. *Str.* 705.

If defendant pleads he was clerk of prothonotary, and daily attended, and ingrossed and drew pleas, and did other business for him in his office, and the affidavit is only that he was a clerk in the office, and was so for several years; it is sufficient. *Read v. Chambers*, *Fort.* 342.

Prothonotary's clerks have no privilege, unless actually employed under him. *Payne v. Fry*, *H.* 9 G. *Str.* 546.

There is no need of alledging a venue where he is attorney, for it shall be tried where the writ is brought, for it is a personal privilege. *R. Sal.* 545. *Cont. R. Carth.* 363.

So, that he is an officer of *C. B.* or *B. R.* &c. as warden of the Fleet. 1 *Sal.* 1.

Philizer. *Sal.* 544.

So, that he is one of the six clerks in chancery, to a suit in *B. R.* *Vide Tho. Ent.* 3.

That he is a clerk in chancery. 20 *H.* 6. 32. b. 1 *Vent.* 264. *Bro. V. M.* 498. *Vide 3 H.* 6. 30. a.

Or servant to a clerk in chancery. *Lut.* 1465.

And he ought to alledge the place of the facts in his plea, for they are triable. *R.* 1 *Vent.* 264. *Semb. Lut.* 1466.

A pre-

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A pre-

A B A T E M E N T.

A prescription to have privilege need not be so precisely alledged, for the court takes notice of it. *Lut.* 1666.

Need not be affirmative, for it is matter in law not traversable. *R. Sul.* 543.

But if an action be against an attorney, &c. and others, who have no privilege, he shall not have privilege. 20 *H.* 6. 32. *b.* 33. *a.*—*Per* 2 Judges, 1 *Vent.* 298. 1 *Vern.* 246. *Bro. Privilege* 7, 9, 12. *Vide in Attorney*, (*B.* 17.)

So if it be against an attorney and his wife. *R.* 1 *Rol.* 580. 1. 45. *Bro. Privilege* 9.

Or against an attorney, as executor or administrator. *R. Hob.* 177. *R.* 1 *Sal.* 2, 7.

If an action be by an attorney, &c. of *C. B.* against an attorney, marshal, &c. in *B. R.* The defendant shall not have privilege. *R.* 2 *Brownl.* 267. *R.* 4 *Leo.* 193. *Hard.* 117. *Godb.* 81. though the attendance of the defendant is more necessary; for the other court was possessed of the cause. 2 *Brownl.* 267.

If the defendant pleads, *quod est attornatus*, &c. without saying *quod fuit, tempore brevis*, it is ill. *R.* 1 *Sal.* 1. *Mayor of Basingstoke v. Bonner*, *P.* 3 *G.* 2. *Str.* 864. *Ld. Raym.* 1567.

Or, *Quod nullus attorn' non debet*, &c. *R.* 1 *Sal.* 328.

Or, *Quod omnes attorn' non debent placitari*, &c. without saying, *vel eorum aliquis*. *R. Lut.* 639. *Hard.* 164. *Sti.* 359. For it is a negative pregnant. *Thickbroom v. Boot*, *P.* 3 *G.* 2. *Fort.* 343.

An action may be brought against a serjeant at law in *B. R.* or other court of *Westminster-hall*, though not elsewhere. *R.* 2 *Lev.* 129. 2 *Mod.* 297.

Plea of privilege as a serjeant, with a writ annexed, is not good without affidavit that he has business there, and there only. *Stiles v. Serjeant Mead*, *H.* 13 *G.* 2. *Str.* 738.

An attorney of *C. B.* has no privilege to be sued in *Middlesex* only; if he is sued in *C. B.* it is enough. *Bareton v. Stephenson*, *P.* 5 *G.* 2. *Fort.* 343. *Reeves v. Blyth*, *T.* 5 & 6 *G.* 2. *Fort.* 343. *Everet v. Blyth*, *H.* 6 *G.* 2. *Fort.* 344.

Serjeant at law and prothonotary's clerks may plead in abatement, if sued by bill instead of original. *Swain v. Girdler*, *T.* 7 & 8 *G.* 2. *Barnes* 371.

If an action be by a man, as accountant or officer in the exchequer, against an attorney of another court, he shall not have privilege. *Hard.* 365.

Otherwise, if it be by one as debtor only, for that is a general privilege, which does not take away privilege elsewhere. *Hard.* 365. *R.* 3 *Leo.* 223.

(*D.* 7.) That he is a tinner, and that *Ed.* 1. granted to the tanners of
As a tinner. *Cornwall* not to be sued elsewhere than in the Stannary Court, upon contracts arising within the liberty, and that this contract arose there. *R. Mo.* 849. 1 *Rol.* 295. *R.* 2 *Rol.* 44. *Vide Courts* (*L.* 1. &c.)

But

But the defendant ought to shew the patent, for he is privy to it. *R. Mo. 849. Dub. 1 Rol. 296.*

And it is no plea, where the defendant is in *custod' mar' de B. R.* *R. 2 Bul. 122, 3.* *This must mean where he is really and not fictitiously in court.*

That he is *monetarius*, and by letters patent of *Edw. 2.* ought to be impleaded before the warden of the mint, and not elsewhere. *Tho. Ent. 3.* (D. 8.)
Assaminter.

*If the court has not a general jurisdiction of the subject in question, the defendant must plead to the jurisdiction, for he cannot take advantage of it on the general issue.—And in every plea to the jurisdiction, another jurisdiction must be stated. *Cowp. 172.**

(D. 9.) At what Time it shall be pleaded.

[In ordinary cases, defendant must plead to the jurisdiction within the first four days; but if defendant comes in voluntarily before he could be obliged, (as in country causes, where tenants cannot be compelled to appear till four days after next term) it may be pleaded afterwards. *Dutcheffs of Hamilton v. Robinson, M. 13 G. 2. Str. 1120.*]

Vide post.
(J. 20.)

A plea to the jurisdiction shall not be after a general imparlance, as, that land is ancient demesne. *Dub. Cro. Car. 9. Dig. 1 Vent. 236. R. ut dicitur Lat. 83.* but there per 2 *J. contra. R. Dy. 210. b. in margine*, that it lies after imparlance in that particular case, but there a judgment is cited, that it is not good after imparlance.

*Nor after *dies datus prece partium*, as that the defendant is covert baron and wife to such a one on the day of the writ purchased. *H. 4 Ed. 3. 115. Th. D. l. 11. c. 2. f. 1.**

That he is a peer. *R. 1 Sid. 29.*

That he is of the Privy-chamber. *R. Ray. 34.*

That he is an attorney, &c. of another court. *Lut. 639. R. Sho. 49. R. 9 Edw. 4. 53. b.*

Or other privilege. *Hard. 365. Sav. 131. Bro. Privilege 7, 25. Barker v. Forrest, M. 9 G. Str. 532.*

Though the imparlance be prayed by mistake, or ignorance. *2 Rol. 294.*

So, after a *dileitur* in the sheriff's court, which is in nature of an imparlance, to have a foreign attachment, the garnishee shall not plead to the jurisdiction of the court there. *R. Carth. 26.*

So a writ of privilege shall not be allowed to an attorney, &c. who claims privilege of suit in another court, after plea, by which he allows the jurisdiction of the court where the action is brought, *R. Mo. 34. Dal. 35.*

So if an attorney of *C. B.* be sued in *B. R.* by *A.* and waive his privilege, he may afterwards be sued there by any other, and cannot claim his privilege. *1 Sal. 2.*

But

But a defendant may plead privilege after general or special bail, for, until bail put in, he is not in court. *R. 3 Lev. 343. 1 Sal. 2. Vide 1 Sal. 8.*

So he may plead privilege as an officer or attorney of *C. B.* though sued by bill in *custod' mar'* and the plaintiff replies *quod est in custod' mar'*; for where he is not in actual custody, but by supposition upon bail, he may plead privilege, for the sheriff cannot take notice of his privilege. *Per Holt. Sal. 1.*

So a *superfedeas* to a suit by reason of his privilege, after he has acknowledged the jurisdiction of the court, comes too late. *R. contra, 3 H. 6 30. a. Vide 20 H. 6 32. a.*

When a jurisdiction shall be ousted by cognisance demanded. *Vide Cognisance in Courts. (P. 2, 3.)*

(E.) Plea to the Person of the Plaintiff.

(E. 1.) Villenage.

TO the person of the demandant or plaintiff it may be pleaded in abatement, that he is a villain to the tenant or defendant. *Co. Lit. 128. a.*

Though he be a villain regardant, or in gross. *Co. Lit. 123. b.*

Though he be his villain only for life, or years. *Co. Lit. 123. b.*

But in an action for the trial of his liberty, as *libertate probanda, homine replegiando, &c.* it is no plea, that the plaintiff is his villain.

Nor in an appeal of the death of an ancestor or husband. *1 H. 4, 5. b. Co. Lit. 123. b.*

Nor in an appeal of rape by the nief against her lord. *Co. Lit. 123. b.*

Otherwise in an appeal of robbery, or mayhem. *Co. Lit. 123. b. 126. b.* *because the lord may take the villain's goods, and in an action of mayhem, damages only are recovered which belong to the lord.*

Nor in an action as executor against his lord. *Co. Lit. 124. a.*

But in actions, which a villain may have against his lord, the lord shall make protestation that the plaintiff is his villain; otherwise the plaintiff shall be enfranchised. *Co. Lit. 124. a. b. 1 H. 4, 5. b.*

So in an action by a villain against a stranger, it is no plea, that the plaintiff is villain to another. *Co. Lit. 123. b.*

Vide Post. (F. 3.)

(E. 2.) Outlawry.

Vide in Pleader, (2 W. 24.)

So it may be pleaded, that the demandant or plaintiff is outlawed. *Co. Lit. 118. a. Vide Lut. 6. 1529.*

When the cause of action is forfeited by the outlawry, it may be pleaded in bar. *Co. Lit. 128. b. 3 Lev. 29.* *as in debt, detainue, &c. where the damages are certain.*

Or in a *scire facias* upon a judgment in trespass, by which the damages are ascertained. *R. per 3 J. Jon. 239. Vide Pleader, (3 L. 12.)*

But

But when in personal actions the damages are uncertain and not forfeited (as in trespass, &c.) and in real actions, it shall be pleaded only in abatement. *Co. Lit.* 128. b. *R. Ow.* 22.

And it may be pleaded in abatement, though it be pleadable in bar. *Semb. Lut.* 1604.

And is a good plea, though the suit be by way of discharge; as in an *audita querela*. *R. 2 Cro.* 425.

So outlawry of one demandant is a plea to both.

Unless he be outlawed for felony; for that is a severance in law.

So in personal actions, outlawry of one plaintiff is a plea to both.

So outlawry may be pleaded in bar to part, in abatement to other part. *Lut.* 1513.

In an action by husband and wife, it is a good plea that the wife was waived.

So if a woman be demandant or plaintiff, that she is waived, *Lut.* 39.

So in an appeal, outlawry in a personal action is a good plea.

St. P. C. 149. a.

So in an information *qui tam*, &c. *R. 2 Mod.* 267.

Outlawry upon mesne process.

Or after judgment. *Lut.* 1529.

So in error by two of a judgment against them, outlawry of one of the plaintiffs. *Ag. 2 Cro.* 616.

So outlawry of a testator is a plea to an action by an executor, *Lut.* 1604.

If one defendant is outlawed, the plaintiff may declare against the other alone. *Vide Lut.* 35.

And though the outlawry be erroneous, it is not a bad plea till it be reversed. *R. Lut.* 40.

But outlawry is no plea, when a man sues *en autter droit*; as executor or administrator. *Co. Lit.* 128. a.

Or in another capacity; as in an action by mayor and commonalty, outlawry of the mayor is no plea. *Co. Lit.* 128. a.

So it is no plea in a writ of error to reverse the same outlawry. *Co. Lit.* 128. a. 1 *Sid.* 43.

Or another outlawry. *Co. Lit.* 128. a. *Dub.* unless the other outlawry be also erroneous. *Bac. Elements* 7, 8.

Nor in an attain. *Co. Lit.* 128. a. 1 *Sid.* 43.

Yet if a man in prison upon a *capias utlagatum* escapes and is retaken; in an *audita querela*, the outlawry is a plea. *R. 1 Sid.* 43.

So in error, *attaint*, *audita querela*, &c. which are for a discharge, outlawry of one plaintiff is no plea. *R. 2 Cro.* 616.

Nor when the outlawry is in a county palatine; as in *Chester*, *Durham*, &c. *Co. Lit.* 128. a.

Outlawry cannot be pleaded before the exigent returned, and the outlawry recorded. *Co. Lit.* 128. b. 288. b.

Nor without shewing there cord of the outlawry *sub pede sigilli*. *Co. Lit.* 128. b.

Except

Except when the outlawry is in the same court; for then it need not be shewn *sub pede sigilli*. *R. Lut.* 40. *R. 2 Mod.* 267. *Lut.* 1514.

If it be not *sub pede sigilli*, the plaintiff ought to refuse it: for if he accepts the plea, he cannot demur for it. *R. 1 Sal.* 217.

Nor can outlawry be pleaded without an averment, that they are the same person.

But if it be said *predi'* plaintiff, no averment is necessary. *R. Lut.* 40. *2 Mod.* 267.

Nor without concluding *prout patet per recordum*; for if the plea concludes, *et hoc paratus est verificare*, it is bad. *R. 3 Lev.* 29.

because the outlawry is to be tried by the record and not by a jury.

If the outlawry be erroneous, the plaintiff shall not take advantage of this by way of replication, but must reverse it by error. *R. Lut.* 40.

But he may reply, that the now plaintiff was dwelling at another place; for then he is not the same person. *R. 1 Leo.* 87.

If the demandant or plaintiff imparles after a plea of outlawry, and before the plea determined obtains a charter of pardon, his writ shall not abate, but he shall proceed. *44 Ed.* 3. 27. *a. Co. Lit.* 128. *b.*

So in an appeal, if outlawry be pleaded and afterwards pardoned or reversed, the plaintiff may pursue his appeal. *St. P. C.* 149. *a.*

So outlawry shall not be pleaded after imparlance. *2 Rol.* 59.

(E. 3.) Attainder.

Vide in Pleader,
(2 W. 24.)

So it may be pleaded in abatement, that the plaintiff is attainted of treason or felony. *Co. Lit.* 130. *a. Noy* 1. *Sho.* 155.

Or attainted in a *præmunire*. *Co. Lit.* 129. *b.*

Or hath abjured. *Co. Lit.* 128. *a.*

So if the cause of action is forfeited by the attainder, it may be pleaded in bar. *Bro. V. M.* 252.

But it is no plea in error for reversal of the same attainder. *Bac. Elements* 7.

Or another attainder. *Dub. Bac. Elements* 7, 8.

So it is no plea, if the attainder was pardoned before the cause of action. *Adm. Sho.* 155.

So a defendant cannot plead, that he himself is attainted. *Dub. 1 Leo.* 330. *R. Co. Ent.* 246. *b. 248. a. 2 And.* 38. 46.

(E. 4.) Alien born.

Vide Alien,
(C. 5.)

So it may be pleaded in abatement in an action real, personal or mixed, that the demandant or plaintiff is an alien, if he be an alien enemy. *Co. Lit.* 129. *b. Aff. Ent.* 11. 9 *Ed.* 4. 7.

Or to the action. *Co.* 129. *b.*

And in an action real or mixed, that he is an alien, though he be in amity. *Co. Lit.* 129. *b.*

So *alien enemy* is a plea in an action *en autre droit*, as executor, &c. *R. Cro. Eliz.* 142.

So in an action upon an obligation by an executor, it may be pleaded, that the testator was an alien enemy. *Semb. Lut. 34. Skin. 370.*

But it ought to appear, that he was an alien enemy at his death. *R. Skin. 370.*

Yet if the replication be, that he continued here till his death by the king's licence, it shall be intended, that he came with licence. *R. Lut. 35.*

Plea that he is alien born is good, though it is not said *de patre et matre extra ligeantiam*, &c. *Sho. 349.*

So though it is not said *natus*, but *oriundus extra ligeantiam*. *R. 4 Mod. 405.*

But in an action personal, it is no plea, that the plaintiff is an alien, if he be in amity. *Co. Lit. 129. b.*

It must be shewn that the plaintiff is alien enemy, which shall not be presumed, nor need the contrary be replied. *R. on Demurrer. Openheimer v. Levy, M. 11 G. 2. Str. 1082. Hoppen v. Leppet, M. 11 G. 2. Andr. 76. S. C.*

As in trespass *quare clausum fregit*. *32 H. 6. 23. b.*

Nor in debt, action upon the case for slander, &c. *R. Dy. 2. b.*

Nor if one sues *en auter droit*, as executor or administrator. *R. Cro. Car. 9. Skin. 370.*

If an abbot or prior sues in right of his monastery. *Co. Lit. 129. a. b.*

So it is no plea in a *scire facias* upon a judgment, that he is an alien; for it ought to be pleaded to the original action. *R. 1 Sal. 2.*

Nor in error on a judgment in an information against him, *Co. Lit. 129. b.*

Nor in any writ of error. *1 Brownl. 42.*

So it is no plea, that he is an alien enemy, when a man is under the protection of the king. *R. 1 Sal. 46.*

And it is a good replication, that he was at the time and now remains in this kingdom, by licence and protection of the king. *George v. Powel, T. 4 G. Fort. 221. * Vide Notes to Co. Lit. 129. b. note 3.**

To a plea that he is an alien born, the plaintiff may reply, that he was born within ligeance.

And the replication ought to shew, where he was born, and from thence the jury shall come. *Tb. D. l. 1. c. 6. f. 5. R. 1 Sid. 357.*

And it ought to conclude to the country; for it shall be tried where the writ is brought. *R. 1 Sal. 2.*

Otherwise where it is pleaded in bar; for then it shall conclude with an averment. *1 Sal. 2. R. 4 Mod. 285.*

So the plaintiff may reply, that he is made denizen by letters patent. *9 Ed. 4. 7. b.*

Or naturalized by parliament. *3 H. 6. 55. a.*

A B A T E M E N T.

(E. 5.) Profession.

So it may be pleaded in abatement, that the demandant or plaintiff is professed in religion. *Co. Lit. 132. a.*

But profession out of the realm, is no plea; for it cannot be tried by the certificate of the ordinary. *Co. Lit. 132. b.*

So profession is no plea, where one sues *en autre droit* as executor or administrator. *Co. Lit. 132. b.*

If a parson or bishop sue for a matter in right of his parsonage or bishopric. *Co. Lit. 132. b.*

If the sovereign of a religious house, as the abbot, &c. sue in right of his house. *Co. Lit. 132. b.*

So if the king's farmer sue for a matter that concerns his farm. *2 H. 4. 7. a.*

So if a man professed joins with his sovereign; as a monk with his abbot, in battery. *Co. Lit. 132. b.*

Or in conspiracy. *Co. Lit. 132. b.*

Or if a man professed be enabled to sue by the king's patent. Or by prescription.

Or by the pope's bull.

So now by *St. 31 H. 8. 6.* and *33 H. 8. 29.* All men and women professed may purchase, sue and be sued, &c. in the same manner as if never professed.

Profession of one demandant abates the writ for all. *7 H. 4. 2. a.*

Otherwise of an executor plaintiff. *3 H. 6. 24. b.*

If profession of the demandant or plaintiff be pleaded, it is sufficient to say that he *was* professed, without saying, that he *is*. *1 Ed. 3. 8.*

When a writ abates by profession pending the writ. *Vide Post. (H. 41.)*

Vide Post. (F. 1.)

(E. 6.) Coverture.

So it may be pleaded to the person of the plaintiff, that she is a *feme-covert*. *Co. Lit. 132. b. Ass. Ent. 9.*

That she is the wife of the defendant. *Semb. 17 Ed. 3. 20. b. 1 Bro. Ent. 63.*

To a plea of coverture the plaintiff may reply, that she is *sole*, which shall be tried by the country. *Ass. Ent. 9, 10.* and then traverse the coverture.

So in an action by husband and wife it may be pleaded, that she was not covert at the day of the writ purchased. *Th. D. l. 11. c. 2. f. 8.*

Or that they never were married. *Sho. 50.*

That there was a divorce between them, and so she is not his wife. *39 Ed. 3. 32.*

But it is no plea, if the husband be banished. *Co. Lit. 132. b. R. Mod. 851. 2 H. 4. 7. a.*

Or hath abjured. *Co. Lit. 132. b. 133. a.*

Or if there be a divorce, though the divorce be only *à mensâ et thoro*. *D. Mo. 666.*

So

So it is no plea, if the queen consort sues alone. *Co. Lit.*

133. a.

Vide Post. (F. 2. H. 42.)

(E. 7.) Excommunication.

So it may be pleaded in abatement, that the demandant or plaintiff is excommunicated. *Co. Lit.* 134. a. *Lut.* 17.

Though he sues as executor or administrator. *Co. Lit.* 134. a.

3 *Lev.* 208.

Or in his political capacity, being a corporation sole; as bishop, &c. *Co. Lit.* 134. a.

So it may be pleaded, that the plaintiff is a popish recusant convict, and therefore *quasi excommunicatus* by *Stat.* 3 *Jac.* 1. *R.* 3 *Lev.* 208. 1 *Brow. Ent.* 5. *Lev. Ent.* 11. 2 *Mod. Ca.* 43. *Clift.* 3.

But that he is a *recusant*, is not good, without an averment that he is a *popish recusant*. *R.* 3 *Lev.* 11.

And convict *de papali recusantia*. *R.* 3 *Lev.* 67.

So that it is not good, without saying, that the conviction was *secundum formam statuti*. *R.* 3 *Lev.* 67. *Vide* 2 *Mod. Ca.* 44.

And the record of the conviction ought to be brought into court. *R.* 3 *Lev.* 333.

And the plaintiff may reply, that the conviction is pardoned. 3 *Lev.* 11, 333.

So the plea is not good, without shewing, before whom he was convicted.

Without saying, *et hoc paratus est verificare per record'*. *R.* *M.* 5 *G.* 1. in *C. B. betw' Moor and ———* (*Comyns's Reports* 307, 309.)

Dub. Whether it shall not be *sub pede sigilli*. 2 *Mod. Ca.* 43. *Vide* 3 *Lev.* 334. (*Comyns's Reports* 308, 309.)

But it is no plea in an action by a corporation aggregate.

That the mayor is excommunicated. *Co. Lit.* 134. a.

Nor in prohibition, &c. that he who sues *Qui tam*, &c. is excommunicated; for he sues for the king also. 12 *Co.* 61.

Nor excommunication by the Pope. *Co. Lit.* 134. a.

Nor excommunication by the bishop himself, who is defendant in the cause; for it shall be intended for the same cause, unless the contrary appears. *Co. Lit.* 134. a.

Excommunication of one plaintiff is a plea to both. *D.* 3 *Lev.* 208.

The plea of excommunication ought to shew the letters under the seal of the bishop declaring it. *Co. Lit.* 133. b. *R.* *Lut.* 19.

If the party shews the certificate of the bishop in his plea, it is not sufficient unless it be *sub pede sigilli*. *Lut.* 19. *Vide* 3 *Lev.* 333, 4.

So if the excommunication be by the delegates, he ought to shew their certificate of it under seal. *Lut.* 19.

Ought to shew the time of the excommunication. 2 *Cro.* 82.

And aver, that the party excommunicated, and the plaintiff, are the same person. 2 *Cro.* 82.

Ought

Ought to shew, by what bishop. *R. Mo. 775.*

If excommunication is pleaded, it shall be tried by the certificate of the bishop.

And none but the king's court can write to the bishop. *Co. Lit. 134. a.*

None but the bishop, or one that has ordinary jurisdiction and is immediate officer to the king's courts, can certify excommunication. *Co. Lit. 134. a. Vide certificate.*

As the dean and chapter, in time of vacation. *Co. Lit. 134. a.*

The archdeacon of *Richmond*. *Co. Lit. 134. a.*

A certificate, that another bishop certified him, is not good. *Co. Lit. 134. a.*

If the bishop die, his certificate is in force. *Co. Lit. 134. a.*

But excommunication may be certified by letters testimonial *sub sigillo*, as well as by direct certificate. *R. 1 Vent. 222.*

By the plea of excommunication the defendant shall go quit without day, but the writ shall not abate; for upon letters of absolution the plaintiff shall have a re-summmons or re-attachment upon the same original. *Co. Lit. 134. a. R. Lut. 19.*

And therefore it shall not be said *petit judicium de brevi*, but it shall be said, *responderi non debet*. *R. 3 Lev. 208.*

Nor shall it conclude with *petit judicium de brevi*, but *quod loquela remaneat sine die quousque*, &c. *R. Lut. 19.*

And *respondere*, for *responderi*, is bad. *R. 3 Lev. 240.*

To this plea the plaintiff may admit the fact, whereupon judgment shall be *quod loquela remaneat quousque*. *Vide Co. Lit. 134. b.*

Or, reply, that the plaintiff is absolved.

Or pardoned by a general pardon. *Dub. 2 Cro. 212.*

If an absolution be produced it is not sufficient, unless it appear to be by the same bishop, or by the archbishop, &c. upon appeal. *R. Mo. 775.*

(E. 8.) Another, who ought to join, not named.

(E. 8.)
Parcener.

So it shall be pleaded in abatement to the ability of the demandant or plaintiff, if he sues alone, when others ought to join with him in the action. *Brañ. l. 5. de exceptionibus. c. 25. Fl. 6. c. 38.*

As where one parcener sues without the other, who claims a right to the same land from the same ancestor. *Co. Lit. 164. a.*

So in any case, if one parcener sues alone, when the other parcener ought to join with him, the tenant or defendant shall plead in abatement.

When parceners ought to join, when not. *Vide in Parcener (A. 5.)*

So if one parcener bring trespass against the other, it is a good plea, that they hold as parceners. *15 Ed. 4. 2.*

So in *Mort d'ancestor*, *Darrein presentment*, &c. *Tb. D. l. 11. c. 26. f. 6.*

If the tenant says, that the land is partible by custom among the heirs males, and that the demandant has a brother not named, it is sufficient, without saying, among whom the land was parted. *Vide Tb. D. l. 11. c. 26. f. 1. 3 Ed. 3. 101. 9 Ed. 3. 467.*

So if the tenant shews that the land is *Gavelkind*, and descended to the demandant and *R.* his brother, it is sufficient, without saying, that *R.* is alive; for if *R.* had issue, the issue ought to join; if he died without issue, the demandant ought to make title as to *R.*'s moiety. *Tb. D. l. 11. c. 26. f. 2. 24 Ed. 3. 25.*

Vide Post. (F. 4.)

So if one jointenant sues, the defendant may plead, that the plaintiff has nothing except jointly with such a one. *Tb. D. l. 11. Jointenant. c. 27. f. 5.* (E. 9.)

In all real and mixed actions jointenants generally ought to join, for they have but one joint title, and one freehold. *Co. Lit. 189. a. 195. b.*

And therefore they ought to join in a writ of right, *præcipe quod reddat*, assise, waste, *Quare impedit*, &c. *Tb. D. l. 2. c. 2.*

So they ought to join, though one only has cause of complaint: As in assise, where a tort is done by the lessee for years of one, which ousts the other jointenant. *Tb. D. l. 2. c. 2. f. 16.*

So they ought to join in trespass, and other personal actions, where they have a joint interest.

So in debt, or avowry for rent. *R. 5 Mod. 73.*

A surviving joint-merchant and the executor of the other joint-merchant, who is dead, may join in *Assumpsit*, &c. for goods, which belonged to them as jointenants. *2 Lev. 228. R. cont. Sal. 444. Vide Post. (E. 12.)*

But they ought not to join in an *audita querela*, where execution is sued against them on a joint recognizance; for it is a several grievance. *R. Noy. 1.*

Vide Post. (E. 12. F. 5.)

So if tenant in common sue a personal action for a matter that concerns his tenements in common, as trespass *quare clausum fregit*, &c. without his companion, it may be pleaded in abatement. *Tenant in common. D. 1 Sid. 49. Tb. D. l. 2. c. 3. f. 4. Co. Lit. 198. a. 1 Sal. 4. R. 5 H. 4. 1. b.* (E. 10.)

Or an action upon the case for a nuisance, &c. *2 Cro. 231.*

So if he sue a real action for an entire thing; as an assise for the service of an horse, which is denied. *Co. Lit. 197.*

Or a *Quare impedit*; for the presentation is entire. *Co. Lit. 197. b. Tb. D. l. 2. c. 3. f. 3.*

Or a writ of ravishment or right of ward; for the body is entire. *Co. Lit. 197. b. Tb. D. l. 2. c. 3. f. 5.*

So if he sue a detinue of charters. *Co. Lit. 197. b. Tb. D. l. 2. c. 3. f. 6.*

Or *Warrantia Chartæ*. *Co. Lit. 197. b.*

So if he sue debt for rent reserved by them upon a lease for years. *Lit. f. 316.*

So in waste upon a lease for years. *2 Mod. 62.*

So if he sue an action upon the case for plowing their lands, whereby their cattle are hurt; for it is not any several damage. *R. Jen. 142.*

But tenants in common shall not join in a real action generally, for they have several titles. *Lit. f.* 311.

15 R. 2. c. 6. Nor in a writ of entry upon the *Stat. R. 2.* or upon *Stat. 8 H.*
2. 8 H. 6. 6. *Th. D. l. 2. c. 3. f. 8.*
c. 9. Nor in a writ of waste upon a lease for life. *Vide 2 Med. 61.*

Nor for forging of false deeds; for that concerns the inheritance. 2 *Cro. 231.*

So if they make a joint lease in tail or for life rendering rent, which is not entire, but may be divided, they shall make several avowries for the rent: for that is incident to the reversion, which they claim by several titles. *Lit. f.* 314.

So if a distress for rent not entire be rescued, they shall not join in rescous. *Lit. 314.*

So they shall not join in an avowry for rent not entire reserved upon a lease for years. *Lit. f.* 317.

So in *quare impedit*, &c. if one jointenant release, the other shall sue alone without him. *Co. Lit. 197. b.*

When a tenant in common shall have an action against his companion, when not, *Vide Post. (F. 6.)*

(E. 11.) By the custom of *London* a wife who is a sole merchant, shall
Baron and have an action without her husband. 1 *Ed. 4. 6. a.*
Feme. *Vide Post. (F. 7.)*

(E. 12.) So in every case where two make a contract, and the one sues
Joint contractor. alone without the other, it may be pleaded in abatement; as, if two deliver 100*l.* to *A.* and one sues an account for it. 10 *Ed. 3. 489.* *Vide 10 Ed. 4. 5. Th. D. l. 11. c. 47. f. 2.*

If there be a bailment of a writing by two, and one brings detinue. 22 *Ed. 3. 5. 24 Ed. 3. 24. Th. D. l. 2. c. 3. f. 6.*

If an obligation be given to *A.* and *B.* and one only sues, without shewing that the other is dead, the defendant may plead in abatement, that the other is alive. *Semb. 1 Sid. 238. 420. 1 Vent. 34.*

Or the defendant may upon *Oyer* demur. 1 *Sid. 238, 420. 1 Vent. 34.*

So if there are several part owners of a ship or goods, they ought to join in a suit against him who takes them away, or prejudices them. *R. 3 Lev. 354. 1 Sal. 32. Vide navigation (J. 3.)*

13 R. 2. ft. If the owner of part of a ship is impleaded in the admiralty for
1. c. 5. 15. a matter at land, and the part of the ship arrested, and thereupon
R. 2. c. 3. he brings action on the statutes of *R. 2.* and *H. 4.* it is no plea in
2 H. 4. c. 11. abatement, that the other part owners did not join. *Smith v. Gibson, T. 9 G. 2. Str. 1045.*

For the cause of action was the suing in the admiralty court, which was against plaintiff only; the detention was no cause of action, but only a consequence of the suit. *Ibid. B. R. H. 271.*

If one joint-merchant die, his executor and the survivor shall join in *trover* or other action for goods that belonged to them jointly. *Dub. whether they ought, Sho. 189. Adm. Lut. 1493. R. 2 Lev. 188, 228. R. contra. Sal. 444. Vide Merchant (D.)*
So

So if a false return be made to the prejudice of several; by which they are put to a charge, they may join in an action; for the charge of the prosecution, which was joint, is the cause of the action. *R. 3 Lev. 362.*

But if several have an interest in a thing, yet if the cause of action be not joint, one alone may have the action: as, if a charter be made to four, and one of them bails it to *A.* he alone shall have detinue for it. *Th. D. l. 11. c. 47. f. 8.*

In trespass for cutting down trees growing on a copyhold, the copyholder shall sue trespass without the lord, and the lord without his copyholder. *2. H. 4. 12. Th. D. l. 11. c. 47. f. 7.*

So if goods bailed are taken out of the possession of the bailee, the bailee shall have trespass alone, and also the bailor alone; and if one recovers, the other's writ shall abate. *48 Ed. 3. 20, 21. Th. D. l. 11. c. 47. f. 6.*

*So where tenant by elegit is ousted, he and the reversioner shall have several assises. *Th. D. l. 11. c. 47. f. 6. **

If one obligee delivers an obligation made to him and others unto an attorney who cancels it, he alone shall have an action for it. *R. Lat. 124.*

So if one joint-tenant or one joint-merchant sues, and it is not pleaded in abatement, no advantage shall be taken of it in evidence. *1 Sal. 290. 2 Lev. 113. 4 Mod. 181.*

In the case of a *joint*, it must be pleaded in abatement; but if he brings *assumpsit*, it may be given in evidence. *Leglise v. Champante, M. 2 G. Str. 820.*

Nor if it appears by a special verdict. *R. 3 Lev. 353. 1 Sal. 32.*

Nor can it be pleaded in bar. *R. Sho. 189. 3 Lev. 290. Carth. 170.*

Vide Post. (F. 8.)

So if one executor sues without naming the others, the defendant shall plead in abatement, that there is another executor living not named. *Ass. Ent. 11. Vide in Pleader (2 D. 2.)* (E. 13.)

Tho' one executor is severed; for there shall not be summons and severance, where the conversion is since the death of the testator. *R. Hard. 317.*

Tho' the other executor be within the age of 17 years. *R. Tel. 130. R. 2 Sand. 213. Ray. 198.*

Tho' the other executor does not administer. *R. 1 Lev. 161.*

Tho' he refuses administration before the ordinary. *Th. D. l. 2. c. 11. f. 6.*

So if one be of the age of one year only, and the other proves the will alone, and takes administration during the minority of the other. *R. Tel. 130. 1 Brownl. 101.*

But if one of the executors be an infant, and the other of full age proves the will alone, he alone may maintain an action without joining the infant. *R. 1 Lev. 181.*

Or may alone have a *scire facias* upon a judgment obtained by his testator. *R. 1 Lev. 181. Ray. 198.*

Yet infants executors may join with him of full age in a *scire facias*. *Ray*. 198.

So if two executors join, and aver that they have proved the will where it appears that one only proved it; it is no cause for a plea in abatement. 1 *Sal*. 3.

Vide Post. (F. 10.)

(E. 14.) So if there are two administrators, and the one sues alone; the defendant shall plead, that there is another co-administrator living not named. *Raft. Ent.* 324. c. *Reg.* 140. a. *Vide in Pleader* (2 D. 10.)

Vide Post. (F. 10.)

(E. 15.) Several joined, when one only ought to sue.

So it may be pleaded in abatement, that several join, when one alone ought to sue the action; as in trespass *quare clausum fregit* by three, when one alone ought to sue. *R. Cro. El.* 143. *Dub.* 2 *Ed.* 4. 23. *R. 1 Leo.* 315.

So in a *quare impedit* by two, when the one had nothing in the patronage. 11 *H.* 4. 54.

So in a real action by two. 12 *H.* 4. 15.

So if principal and bail join in error of a judgment against them; for the judgments against them are several. *R. 2 Cro.* 384. *Hob.* 72. *Cro. Car.* 300, 408, 575. *R. 1 Rol.* 294. *Jon.* 360.

But when two have one entire joint damage by any wrong, they may join, tho' their interests are several; as, two lords of two manors may join in an action for not grinding at their mills, when the party ought to grind at the one or the other. *R. 2 Sand.* 116.

All the dippers at *Tunbridge Wells* may join in an action against one who disturbs them in their employment; (acts as a dipper when not approved by the lord of the manor, though chosen by the homage.) *Weller v. Baker*, *T.* 9 *G.* 3. 2 *Wilf.* 414.

If a man plead, that the plaintiff or demandant has nothing but jointly with such an one who is alive and not named, he ought to shew where he is living; for the issue shall be joined upon the life, not upon the death, which comes on the part of the tenant or defendant. 22 *Ed.* 3. 8.

If a man plead joint-tenancy on the part of the plaintiff or demandant, he need not shew, of what gift. *M.* 19 *H.* 6. 32. *Agr.* 21 *Ed.* 4. 78. *for it is not within his knowledge.*

Jointenure on the part of the tenant or defendant, *Vide Post*. (F. 5)

(E. 16.) No such person *in rerum naturâ*.

So, the defendant shall plead to the person of the plaintiff, that there never was any such person *in rerum naturâ*. *Bro. Briefs* 25. *Tb. D. l.* 11. c. 7. *Ass. Ent.* 10.

Or, that there never was one of the plaintiffs *in rerum naturâ*.

Or, that there never was such an one in *rerum naturâ* as *A.* who is named another defendant. *Per Vavifour. 21 Ed. 4. 6. Bend. pl. 196. Th. D. l. 11. c. 7. 27 H. 8. 26. b.*

And no such person in *rerum naturâ*, as to one, abates the whole writ. *R. 27 H. 8. 26. b.* There having been several determinations both ways, before that time.

But, that there was no such person at the day of the original purchased, is ill; for he ought to say that he was dead before the original purchased, or that there never was such a person in *rerum naturâ*. *Bro. Brief 25, 70. 21 Ed. 4. 6.*

(E. 17.) Death of the Plaintiff.

So, that the plaintiff died before the original purchased. *Aff. Ent. 8. Vide Reg. pl. 293. Dub. 2 Vent. 196.*

So, that one of the defendants died before the original purchased. *27 H. 8. 26. b. Reg. pl. 293.*

Though it be in an action in which the death of one defendant does not abate it, as in trespass; for here the writ was always false. *Bro. Brief 175, 301. Th. D. l. 11. c. 7. f. 1, 2, 4, 5. Dub. Vid. Post. (H. 35.)*

In an assise. *Per Knivet 23 Aff. pl. 10.*

So the death of one defendant before the original purchased abates the whole writ. *27 H. 8. 26. b.*

When a writ abates by the death of the plaintiff or defendant *pendente lite.* (*Vide Post. H. 32, 33, 34, 35.*)

(E. 18.) Misnomer of the Plaintiff.

So he shall plead misnomer of the plaintiff, if his Christian name be mistaken. (E. 18.)

Or if his Christian name be omitted.

In name of baptism.

Tho' he be known by the name by which he sues; for he can have but one name of baptism, and ought to sue by his true name, and not by the name by which he is known. *Th. D. l. 3. c. 1. f. 7.*

But if bond be given to *Elizabeth*, and action brought in the name of *Elizabeth*, defendant shall not plead that plaintiff's name is *Isabel.* *Monkhouse v. Hutchinson, H. 1721. Bunb. 101.*

So if a peer of the realm sue, he ought to sue by his name of baptism; as an earl. *Th. D. l. 3. c. 1. f. 6.*

Yet a plaintiff may sue by his name of confirmation. *Th. D. l. 3. c. 1. f. 7. R. 2 Rol. 135. A.*

And a corporation aggregate shall sue by its name of incorporation only. *2 Inst. 666.*

As a mayor and commonalty, without the Christian name of the mayor. *12 Ed. 4. 10. 2 Inst. 666.*

Dean and chapter, without the christian name of the dean. *Cont. 14 H. 4. 10. Acc. 21 Ed. 4. 16. 2 Inst. 666.*

The warden and fellows of a college, without the Christian name of the warden. *R. 1 Leo. 307. Vide 2 Inst. 666.*

A B A T E M E N T.

So a religious man professed shall sue by his name of dignity, without his Christian name; as an abbot. *Th. D. l. 3. c. 1. f. 3. 6. M. 8 Ed. 3. 427. P. 29 Ed. 3. 44. P. 7 H. 6. 27. Vide Post. (F. 17.)*

(E. 19.) So if the surname of the plaintiff be omitted, it shall be pleaded in surname, in abatement.

Or if it be mistaken,

Or if his name of baptism be joined to his name of office, it is not sufficient without his surname; as *A. parson of D. M. 27 H. 6. 3.*

But if the surname by which he is known is added, it is sufficient. *Th. D. l. 3. c. 2. f. 1.*

And the plaintiff may reply to the plea of misnomer, that he is known by the one name or the other.

So if it be said, *A. the daughter or son of B.* it is sufficient, without any other surname. *Th. D. l. 3. c. 2. f. 6, 7, 8.*

So if a feme covert be called, the wife of *B.* it is sufficient without other surname; for she cannot sue by the surname of her father. *Th. D. l. 3. c. 2. f. 3, 4. R. 2 H. 4. i. b.*

So if a name be joined to the name of dignity, it is sufficient, without other surname; as *A. duke of B. or earl of B. Th. D. l. 3. c. 3. f. 5.*

W. archbishop, or bishop of A. Th. D. l. 3. c. 3. f. 5.

Yet if the surname be also added, it is good. *Th. D. l. 3. c. 3. f. 5.*

Vide Post. (F. 18.)

(E. 20.)
Name of
dignity.

So if the plaintiff has a name of dignity, and it be omitted or mistaken, it shall be pleaded in abatement: as if he is an earl, &c. of this realm. *Vide Th. D. l. 3. c. 3. f. 7, 8.*

Or a knight. *Th. D. l. 3. c. 3. f. 14. Reg. pl. 288.*

Or a bishop.

Or where the defendant is master of an hospital. *Per Scrope. H. 2 Ed. 3. pl. 8. Th. D. l. 3. c. 3. f. 4.*

Or *Baronettus*, and not *Miles et Baronettus*.

So if a statute be acknowledged by *A. B. Arm'*, and he afterwards becomes a baronet, and the statute be extended against him by the name of *A. B. Arm'*, without naming him baronet, the process shall be abated. *R. Hob. 129.*

But a dignitary of another realm need not be so named; as an earl in *France*, &c. *20 Ed. 4. 6. a.*

Or in *Ireland. Pal. 345.*

Yet a writ against a king of another realm ought to name him king; as against *E. Baliol* king of *Scotland. Th. D. l. 3. c. 3. f. 7. T. 20 Ed. 4. 6.*

So against a bishop of *Ireland*; for he is a bishop of the church universal. *Pal. 345.*

So if a bishop or abbot be deposed, he shall not afterwards be sued by his name of dignity, for he loses it. *Per Paſſon, 21 H. 6. 3.*

So a lord of parliament, if he be not also a dignitary, need not name himself *Dominus*. *Th. D. l. 3. c. 3. f. 15.*

Yet if he sues by the name of *Dominus*, the writ shall not abate. *Th. D. l. 3. c. 3. f. 15.*

So if a woman noble by marriage afterwards marries beneath the degree of nobility, by which she loses her dignity, if the husband and wife sue, naming the wife by her name of dignity, it may be pleaded in abatement. *Semb. 4 Leo. 196. R. Dy. 79. b.*

*An archdeacon is said not to be a name of dignity, and therefore he need not be named archdeacon. *Th. D. l. 3. c. 3. f. 17.**
Vide Post. (F. 19.)

So if the plaintiff sues for any thing relating to his office, he ought to name himself by the name of his office, otherwise it may be pleaded in abatement. E. 21.)
Name of
office.

As if a sheriff brings rescous, and does not name himself sheriff. *H. 6 H. 7. 14.*

If a monk, as the king's farmer, sues, and does not name himself farmer. *2 H. 4. 7. a.*

If a prebendary brings a real action for land of his prebend, and does not name himself prebendary. *Th. D. l. 3. c. 5. f. 1.*

If a præcentor brings a *quare impedit* for a prebend annexed to his præcentorship, and does not name himself præcentor. *14 H. 6. 14. Th. D. l. 3. c. 5. f. 5.*

If a prior, being parson of *D.* sues for a matter appertaining to that church, and does not name himself parson. *P. 12 H. 4. 20. M. 10 H. 7. 5. 18 Ed. 4. 17. Th. D. l. 3. c. 5. f. 6.*

If a dean brings a *præcipe* or other action by reason of his being dean, he ought to be named so. *Vide Th. D. l. 3. c. 3. f. 6.*

If a guardian in chivalry sue for any thing, to which he has a right as guardian, and be not named guardian. *Th. D. l. 3. c. 7.*

If an attorney sue a writ of privilege, and do not name himself attorney. *M. 3 Ed. 4. 26.*

If the warden of the *Fleet* sue privilege, and be not named warden. *Th. D. l. 3. c. 4. f. 2.*

So if a man sues as executor, and does not name himself executor. *Th. D. l. 3. c. 8. f. 2, 4.*

Or be only administrator. *Clift. 15.*

And where an executor is sued, he ought to be named executor in the first name; for it is not sufficient in the *alias dictus*. *30 H. 6. 5.*

But if an officer does not intitle himself to an action by his office, he need not name himself by name of office; as, if a treasurer, chancellor, &c. sues. *Th. D. l. 3. c. 4. f. 1.*

If a man brings an assise of a chapel which he holds of the collation of the king, he need not name himself parson or chaplain; for it does not appear that he is instituted. *Th. D. l. 3. c. 5. f. 2.*

So a parson need not name himself parson, in an account against his bailiff for the profits of his church. *Adj. 30 Ed. 3. 1. Th. D. l. 3. c. 5. f. 3.*

Nor

Nor in trespass for an assault or *de parco fratto*, upon a distress for services due to his church. *Semb. 2 H. 4. 22. 10 H. 7. 5. Tb. D. l. 3. c. 5. f. 4.*

So a dean in trespass need not name himself dean. *Vide Tb. D. l. 3. c. 3. f. 6.*

So an heir need not name himself heir, in a detinue of charters which he claims from his ancestor. *Tb. D. l. 3. c. 6.*

Nor an executor name himself executor, in trespass for goods of the testator carried out of his possession. *P. 19 H. 6. 65.*

So an assignee, in covenant need not name himself assignee. *R. 2 Cro. 240. where he shews a legal assignment.*

Vide Post. (F. 20.)

(E. 22.) In other addition to his name. So if a plaintiff sues, and to his name of baptism and surname adds the addition of any place or vill, and that be mistaken; it may be pleaded in abatement. *Tb. D. l. 3. c. 2. f. 9.*

So if the plaintiff sues by his Christian name and surname with an addition, and in other actions the addition is omitted, it shall be pleaded in abatement: as, if he sues by the name of *Henry Norman* of *B.* and in other writs against the same defendant in another county, is named *Henry Norman* only, the other writs shall abate where the addition is omitted; though it was objected, that perhaps there was another of the same name in the county where the first action was brought, and not in the county where the other actions are brought. *M. 9 Ed. 3. pl. 40. Tb. D. l. 3. c. 2. f. 11.*

So if a prior sue by the name of the prior of *St. A.* of *B.* and sue another writ by the name of the prior of *St. A.* near *B.*; one of the writs shall abate. *Tb. D. l. 3. c. 9. f. 6.*

So if the plaintiff sue as an officer; it is a good plea, that he was not officer at the time. *Tb. D. l. 3. c. 4. f. 3.*

So if the plaintiff sue by the name of *A. B.* gentleman, and it is pleaded, that he is no gentleman, it will be well. *R. upon Demurrer. Mod. Ca. 80.*

But if a man sue by the name of executor, in trespass for his own goods taken away, the writ shall not abate. *P. 9 H. 5. 5.*

So if a man sue by the name of administrator for his own debt. *Dub. 9 H. 5. 5. Semb. Bro. Administrator, 21.*

So though the addition be imperfectly expressed; as, if a man sue by the name of *A. B.* chaplain of the chantry of *T.* without saying in what church the chantry was. *12 H. 4. 19.*

If an abbot sue by the name of *A. Abbas beat' Mar' Ebor'* without saying *Ecclesie beat' Mar'* *Tb. D. l. 3. c. 9. f. 1. l. 6. c. 3. f. 5.*

Vide Post. (F. 22.)

(F) Plea to the Person of the Defendant.

(F. 1.) Profession.

A Defendant may plead in abatement, that he is a monk professed, and ought not to be sued without his sovereign. *Tb. D. l. 4. c. 3. f. 1.*

Though the trespass or other cause of action was committed by the monk, before his profession. *Th. D. l. 5. c. 5. f. 1.*

But if he be made an abbot, he may be sued in an account upon a receipt whilst he was a monk. *Th. D. l. 4. c. 3. f. 4.*

So in an appeal of robbery, a monk shall be sued without his sovereign. *Th. D. l. 4. c. 3. f. 6.*

The plea of profession in the defendant ought to shew that he is in subjection also. *14 H. 4. 10, 36.*

Vide Ante (E. 5.) Post. (H. 41.)

(F. 2.) Coverture.

So a defendant may plead in abatement, that she is *covert-baron*. *Reg. pl. 290. Lut. 23.*

[If she pleads by her maiden name, plea of coverture shall be set aside. *Barnes 334.*]

Or, that she is the wife of the plaintiff. *Th. D. l. 11. c. 2. l. 7. 12 Ed. 3. 481. Ray. 395.*

Though her husband lives out of the realm. *Per Lit. 18 Ed. 4. 4.*

Though she has given a bail-bond; for if she be covert, it is not her deed. *R. 1 Sal. 7. Mod. Ca. 311.*

Though the suit was commenced in the inferior court, and after coverture, removed; for the proceeding in *B. R.* is *de novo*, *R. 1 Sal. 8.*

But a wife may be sued alone without her husband, if the husband be in exile. *Co. Lit. 132. b. Th. D. l. 4. c. 4. f. 1.*

Or hath abjured the realm. *Vide Co. Lit. 133. a. Th. D. l. 4. c. 4. f. 2.*

So if he be an alien enemy, and out of the realm. *R. 1 Sal. 116.*

So in an appeal of death, or felony. *Th. D. l. 4. c. 4. f. 4. Vide 1 H. 4, 5.*

So if a wife be received upon the default of the husband, and vouch to warranty, and the tenant by her warranty die; a re-
summons shall go against the wife alone. *Th. D. l. 4. c. 2. f. 3.*

So a *feme-covert* may be indicted without her husband for a gross crime; as felony, recusancy, &c. *1 Sid. 410.*

So for ingrossing, &c. *Dub.* for she cannot make a contract. *1 Sid. 410.*

So in an action against a woman as a *feme-covert*, the defendant may say, that she is *sole*. *Th. D. l. 11. c. 2. f. 5.*

So in an action against husband and wife, they may plead, that there was a divorce between them before the writ purchased. *Cro. El. 352.*

And if it be shewn, that there was a divorce, it shall be presumed to have continuance. *Cro. El. 352.*

But if they plead *A. and B. uxor ejus* were divorced, it is bad; for the record admits them to be husband and wife. *R. Cro. El. 352. * and after divorce she is no longer uxor ejus.**

To

To a plea of coverture the plaintiff may reply, that the defendant was not *covert*. *Cl. Aff.* 15.

A plea of coverture shall not be pleaded after an imparlance.

R. Lut. 24. *Vide Post.* (J. 20.)

Vide ante (E. 6.) *Post.* (H. 42.)

(F. 3.) Villenage.

So the defendant may plead, that he is a villain, if he be sued without his lord. *Tb. D. l. 4. c. 5. f. 1.*

So if the tenant acknowledge himself to be a villain *pendente lite*, the writ abates. *Tb. D. l. 4. c. 5. f. 1, 5.*

Though he acknowledge himself villain to an abbot, &c. which is an amortisement. *Tb. D. l. 4. c. 5. f. 4.*

So in an action against husband and wife in right of the wife, if the husband acknowledge himself a villain, the writ abates. *Tb. D. l. 4. c. 5. f. 3.*

Otherwise, if a man infeoff another *pendente lite*, and then acknowledge himself a villain. *24 Aff. pl. 1. Tb. D. l. 4. c. 5. f. 8.*

Or if a *feme-sole* take a husband *pendente lite*, and then acknowledge herself a niefce. *18 Aff. pl. 10. Tb. D. l. 4. c. 5. f. 6.*

By the *St.* 37 *Ed.* 3. 17. No writ shall be abated by exception of acknowledgment of villenage, if the demandant will aver, that he who alledged the exception was free the day of the writ purchased.

And it is no plea, that one of the tenants or defendants is a villain, in an assise against the other as a disseisor. *17 Aff. pl. 16, 19. 17 Ed. 3. 52. Vide Tb. D. l. 4. c. 5. f. 7.*

Nor in waste; for waste does not lie against the lord for waste by his villain. *Per Finchden. T. 48 Ed. 3. 19.*

If an action be sued against the lord alone before his entry into the land, without naming the villain, the writ shall abate; for the lord shall not be tenant unless he pleases. *Tb. D. l. 5. c. 7. f. 1.*

Vide Ante (E. 1.)

(F. 4.) Another, who ought to be joined, not named.

(F. 4.)
Parcener.

The tenant or defendant may plead in abatement, that he is not a person able to answer without another not named, who has equal right with himself. *Brañ. l. 5. de exceptionibus, c. 26.*

As, if a parcener be sued, she may plead, that there is another co-heir not named. *Tb. D. l. 5. c. 1. f. 2, 3, 5.*

Though the other not named be within age.

And though the parceners be in by several descents. *42 Ed. 3. 17. 37 H. 6. 8. 9 Ed. 4. 13. Tb. D. l. 5. c. 1. f. 7.*

In *replevin*, one parcener cannot avow for rent without the other. *R. 1 Sal. 390.*

But the plaintiff may reply, that there had been a partition between the parceners. *Tb. D. l. 5. c. 1. f. 2.*

And

And after partition they shall not be joined, tho' one was within age at the time of the partition. 9 H. 6. 5. *Th. D. l. 5. c. 1. f. 6.*

So if the one parcener enter by disseisin for himself and her sister; in an assise against her, it is no plea, that her sister is not named; for she cannot be parcener with a disseisorefs. 27 *Aff. pl. 68.*

Vide Ante (E. 8.) Vide Parcener (A. 4.)

So if a jointenant be sued, he may plead, that he holds jointly with such a one, who is alive and not named. (F. 5.) Jointenant.

As in a right of advowson and darrein presentment. *Vide 14 H.*

4. 12. M. 19 H. 6. 33. *Th. D. l. 11. c. 28. f. 44.*

In a *precipe quod reddat.* *Th. D. l. 11. c. 28. f. 23. 50.*

In a writ of entry. *Th. D. l. 11. c. 28.*

In a *formedon.* 48 *Ed. 3. 16. 2 Leo. 161. Dal. 75. Vide Th. D. l. 11. c. 28. f. 36.*

In *per qua servitia.* 3 *Ed. 3. 97. [34.] Th. D. l. 11. c. 28. f. 9, 28.*

In a writ of deceit upon a recovery. *Th. D. l. 11. c. 28. f. 17.*

In a writ of ward of the body and land. 49 *Ed. 3. 27. Th. D. l. 11. c. 28. f. 37.*

In a right of ward. *Th. D. l. 11. c. 28. f. 42.*

So in ward of the body. *Th. D. l. 11. c. 28. f. 32.*

In a *Juris utrum.* M. 2 *Ed. 3. 57. Th. D. l. 11. c. 28. f. 5.*

In an assise of land. *Th. D. l. 11. c. 28.*

So in an assise of rent, jointenancy in the land is a good plea.

45 *Aff. pl. 14. 12 H. 4. 21. b. Th. D. l. 11. c. 28. f. 41.*

In dower. *Th. D. l. 11. c. 28.*

In dower against a guardian, jointenancy in the ward by deed.

9 H. 5. 4. b. *Th. D. l. 11. c. 28. f. 45.*

In waste against a guardian. *Th. D. l. 11. c. 28. f. 38.*

In a partition, by one jointenant to make partition. *Co. Ent.*

413.

In a *Cessavit.* 3 *Ed. 3. 110. 47. Th. D. l. 11. c. 28. f. 10.*

A man shall plead jointenancy with his wife. *Th. D. l. 11. c. 28. f. 2. 10, 12.*

Tho' the wife die pending the writ; for the death does not make a bad writ good. *Th. D. l. 11. c. 28. f. 31.*

Or with villain. 48 *Ed. 3. 16. Vide Th. D. l. 11. c. 28. f. 36, 18. (a)*

(a) Neither of the authorities here cited is directly in point, that the tenant may plead that he holds jointly with another who happens to be villain either to himself or to the demandant. One is a case in assise, where the tenant pleaded jointenancy by deed with one not named, of the gift of one William, the demandant replied, that this William was his villain, and held in villainage, and aliened, &c. yet the plea was held good, and the writ abated.— The other is a case in *formedon*, where the tenant pleaded jointenancy with an alien, and though the demandant replied that that alien was his villain, that replication was not allowed.

Or

Or with one who is named in the render of a fine, tho' he never had any thing in possession. 8 H. 4. 12.

And one tenant may plead jointenancy, tho' the other tenant will not do it. 8 Aff. pl. 8. Th. D. l. 11. c. 28. f. 15.

And if *A.* plead jointenancy with *B.* whereby the writ abates; to another writ against *A.* and *B.* they may plead jointenancy with *D.* 39 Ed. 3. 36. a. 41 Ed. 3. 4. 45 Ed. 3. 17. Th. D. l. 11. c. 28. f. 33.

So a man may plead jointenancy of parcel. Aff. Ent. 10.

But the writ shall abate only as to that parcel. Th. D. l. 11. c. 29. Cont. Per 2 J. 2 Leo. 162. Asc. Dal. 75, 106.

Yet in assise of rent, if the tenant plead jointenancy in parcel of the land, the writ shall abate for the whole. 45 Aff. pl. 13. Th. D. l. 11. c. 29.

But if a man answer as sole tenant in an assise, he shall not plead jointenancy in an attain brought by the plaintiff in the assise. 26 Aff. pl. 12.

At common law if the tenant at the first day in court had pleaded jointenancy by charter or fine, and had shewed the deed, the demandant could not have had any answer. Th. D. l. 11. c. 28. f. 1, 19. 2 Leo. 161.

Nient comprise en le fine should not be replied. Th. D. l. 11. c. 28. f. 6. 23.

Nor that the tenant was only a disseisor. 5 Ed. 3. 237. 15 Aff. pl. 13. Th. D. l. 11. c. 28. f. 14, 18, 46, 47.

But without shewing of a charter or fine, the plea of jointenancy with a stranger would not have been good. Th. D. l. 11. c. 28. f. 42.

But the transcript of the fine was sufficient. 3 Ed. 3. 63. Th. D. l. 11. c. 28. f. 7.

And jointenancy with his wife might have been pleaded, without shewing the deed or fine. Th. D. l. 11. c. 28. f. 2, 9, 10.

But by the stat. 34 Ed. 1. *De conjunctim feoffatis*, In assises of Novel Disseisin, Mort d'ancestor, Juris utrum, and other writs where tenements are demanded at the first day in court, if the tenant alledge, that he holds jointly with his wife or a stranger, and shew a deed testifying the same, the demandant may aver, that he was sole tenant the day of the writ purchased, and the justices of assise shall summon as well the person absent as the present tenant, to answer upon a day certain, as well to the plea as to the lands demanded and put in view.

If both appear, and it be found that they held not jointly, tho' the assise pass for the tenant, yet he shall suffer a year's imprisonment, and be fined for his false plea.

If the tenant make default, and the other appear and disavow the deed, or if both make default, the assise shall be taken by default; and if found that they held not jointly, and also that the tenant did disseise the demandant, the demandant shall recover his seisin and double damages, and the tenant shall be imprisoned for his false plea.

But

But if found that they held jointly, then the writ shall abate, though the tenant made default; and the assise shall pass no further.

And by the same statute, bailiffs shall not be allowed to plead jointenancy.

So upon a plea of jointenancy by charter, process shall be awarded upon the *stat. of the 34th Ed. 1. de conjunctim Feoffatis*, though the demandant does not make any replication at all. *1 Ed. 3. 13. Th. D. l. 11. c. 28. f. 3.*

So if a tenant plead jointenancy, and it be found specially, whereby it appears that the demandant has title, he shall recover, though there was a jointenancy. *Th. D. l. 11. c. 28. f. 20.*

If a tenant plead jointenancy, and shew a will for it, process does not go upon the statute. *27 Aff. pl. 70.*

So no process goes upon the statute, if a freehold be not demanded; as in a writ of ward for the body and land, if jointenancy be pleaded in the freehold of the land, as it may, and this be denied, yet process shall not go upon the statute. *49 Ed. 3. 27. Th. D. l. 11. c. 28. f. 37.*

So if jointenancy by fine be pleaded; this is not within the statute, and the demandant cannot reply, that he is sole tenant. *R. 2 Leo. 161, 2. R. Dal. 75.*

And if it be so replied, and so found, yet judgment shall be against the demandant. *Semb. 2 Leo. 162.*

If the tenant plead jointenancy, and the demandant reply that he was sole tenant at the day of the writ purchased, this shall not be tried without process according to the statute, *34 Ed. 1. 29. 23 Aff. pl. 13. Vide Th. D. l. 11. c. 28. f. 24.*

So if the tenant plead jointenancy by deed, and the other being warned by process according to the statute, does not appear, the tenant shall not be received afterwards to plead jointenancy by fine. *22 Aff. pl. 1.*

If the demand be of tenements in *A.* the tenant may plead jointenancy of tenements in *B.* with an averment, that *B.* is an hamlet of *A.* *Th. D. l. 11. c. 28. f. 25.*

So, without such an averment. *26 Aff. pl. 2. Th. D. l. 11. c. 28. f. 25.*

If the plea be, that he held jointly at the day of the writ purchased, it is sufficient, without saying, and all the time since. *37 H. 6. 16.*

But a man shall not plead jointenancy with such an one, without saying, that he is alive. *29 Ed. 3. 60. Th. D. l. 11. c. 28. f. 28.*

And he ought to say, where he is alive.

And in an assise, the tenant ought to plead in this form, *that he holds jointly, &c.* *Th. D. l. 11. c. 28. f. 49.*

But in a *Præcipe quod reddat*, partition, &c. the other form, *that he has nothing but jointly, &c.* is usual. *Co. Ent. 413. Th. D. l. 11. c. 28. f. 49.*

In every real action where the tenant pleads jointenancy of his own part, he ought to shew of what gift. *By all the justices, M. 19 H. 6. 32. T. 19 H. 6. 78. Agr. 21 Ed. 4. 78. Dy. 32. a.*

So

So if a feoffment were to the use of husband and wife before the statute 27 H. 8. 10. and, after the use executed, in an action against the husband alone, he pleads, that he holds jointly with his wife, he ought to shew the statute. *Dy. 32. a.*

To jointenancy pleaded, the demandant or plaintiff by replication may say, that the tenant or defendant is sole tenant, and traverse the jointenancy. *Ass. Ent. 393.*

Or, that the tenant and himself hold jointly, and traverse, that any other holds with them. *Co. Ent. 413.*

That the demandant or plaintiff was seised, until disseised by *A.* who enfeoffed the tenant and another, and then the demandant re-entered, and was disseised by the tenant alone. *Th. D. l. 11. c. 28. f. 46.*

But he ought to suggest a disseisin in the feoffor; for a bare entry is not sufficient. 22 H. 6. 50. *Th. D. l. 11. c. 28. f. 48.*

And if jointenancy be pleaded with his wife, such a replication is not good; for by the entry, the jointure in possession is destroyed only in right, *Semb. Th. D. l. 11. c. 28. f. 47.*

Vide ante (E. 9.)

(F. 6.)
Tenant in
common.

If a man sue a personal action against a tenant in common touching the lands held in common, without naming his companion, he shall plead, that he held in common the day of the writ purchased.

As in a writ *de rationabili parte.* *Th. D. l. 11. c. 30. f. 1.*

In trespass *quare clausum fregit, et herbam, et blada consumpsit, &c.* *Vide Co. Lit. f. 323.* *The defendant may plead that he holds in common with the plaintiff.*

So if a man avow as bailiff to *A.* tenant in common with *B.* for damage feasant, it is ill; for it is in the personalty, and he ought to avow as bailiff to both of them. *R. 1 Jon. 253.*

[Tenant in common may maintain action of trespass against his companion, for the mesne profits of lands recovered in ejectment (though by default.) *Goodtitle v. Tombs. T. 10 G. 3. 3 Willf. 118.*]

But if one tenant in common bring trespass for breaking his close against his companion, he may plead, that he holds in common with him. *Th. D. l. 11. c. 30. f. 6.* But it ought not to be pleaded; for it will be Not guilty. 1 *Sal. 4.* *R.* that it may be pleaded. *Skin. 12.*

So in trespass against *A.* and *B.* it is no plea, that *B.* is tenant in common with the plaintiff; for it amounts to Not guilty. *R. 1 Sal. 4.*

If the defendant pleads, that he holds in common with such a one not named, he ought to shew how they hold in common. 3 *H. 6. 56. b.*

In *replevin*, tenants in common ought to avow severally, for rent. 1 *Sal. 390. Jon. 253.*

If an husband and wife and *A.* are tenants in common, and the husband die, and his wife sue dower against the heir before partition,

tion, it is no plea, that he is tenant in common with *A.* and the demandant. *R. 3 Lev. 84.*

Vide ante (E. 10.)

So if an action be sued against a husband alone, where the wife ought to be joined; it may be pleaded in abatement, that he holds jointly with his wife not named. *Ass. Ent. 10. Vide Baron and Feme* (Y.) (F. 7.) Baron and feme.

As in all actions, in which the inheritance or freehold is demanded, or ought to be recovered, if the husband is seised jointly with his wife by purchase before or after marriage. *Th. D. l. 5. c. 4. f. 1.*

Or if the husband hold in coparcenary with his wife, without partition made before marriage. *Th. D. l. 5. c. 4. f. 1.*

Or if land descends to them in parcenary after marriage. *Th. D. l. 5. c. 4. f. 1.*

So if the husband be seised in right of his wife. *Th. D. l. 5. c. 4. f. 1.*

So if the husband enter, claiming in right of his wife, though the wife had no right. *35 Ass. pl. 5.*

So in debt for rent upon a lease for lives made to both. *1 Rol. 348. l. 50.*

Or upon a lease for years. *1 Rol. 348. l. 45.*

In a writ *contra formam feoffamenti*, where the husband has nothing in the seigniori, but jointly with his wife. *Th. D. l. 5. c. 4. f. 7.*

In a writ *de seſſa ad molendinum*, which the husband holds jointly with his wife. *Th. D. l. 5. c. 4. f. 8.*

In a writ of ward which the husband claims in right of his wife. *Th. D. l. 5. c. 4. f. 27.*

In waste, upon a demise made to both for years. *17 Ed. 4. 7.*

An action is maintainable against a wife, who is a sole merchant, by the custom of *London*, without naming her husband. *1 Ed. 4. 6. a. Mo. 135.*

As where a wife buys and sells by herself in a trade, with which her husband does not intermeddle. *Cro. Car. 69.*

Vide ante (E. 11.)

So if an obligation be joint, and one obligor is sued without the other, it may be pleaded in abatement, that the other is alive not named. *Ass. Ent. 7. Cro. El. 355. Lut. 696.* (F. 8.) Joint contractor.

So in detinue upon a bailment to two. *7 H. 4. 6.*

So in debt upon a joint contract. *20 H. 6. 11. 9 Ed. 4. 24. b.*

Upon a lease to two, though one of them never sealed the deed, if he occupy the land. *38 Ed. 3. 8.*

So in account against one, where two were made receivers. *10 Ed. 4. 5.*

So in an action upon the case against owners of a ship for goods spoiled by the default of the master. *R. Sal. 440. Vide Action upon the Case for Negligence* (E. 1.)

And,

And, if a partnership be found by the verdict, the action abates, though not pleaded in abatement. *Vide Sal. 440. Carth. 63.*

* But this seems not to be law at this day, for *partnership* must be pleaded in abatement, and cannot be given in evidence to *non-suit* the plaintiff. *5 Bur. 2611.**

So in an *Audita querela* reciting, that the defendant, being enfeoffed upon condition to re-enfeoff, &c. by collusion between him and *R.* made a recognizance to *R.* before the re-enfeoffment; the writ shall abate for not naming of *R.* who was a party to the deceit. *26 Ed. 3. 73.*

So if a judgment be against three in a *scire facias* upon a recognizance by them, and debt is brought upon this judgment against one only. *R. 2 Leo. 220.*

So if there be an *indeb. ass.* against *A.* and it appears, that *A.* and *B.* were partners; though *B.* is dead, if his death is not suggested. *R. 2 Mod. 280.*

But if two commit trespass together, in trespass against one of them, it is no plea, that there is another joint-trespasser not named. *14 H. 4. 21. M. 11 H. 7. 6.* * For each is guilty of a distinct trespass.*

So, in an action for a false return by a mayor and corporation upon a *mandamus*, it may be against the mayor alone, or other person by himself in his natural capacity; for it is a several tort. *R. Carth. 171.*

So if a contract be joint and several; it is no plea, that the one is sued alone. *Adm. Lut. 696.*

If a man pleads, that he was bound jointly with *A.* who is alive, and not named, it is not sufficient, without saying, that *A.* likewise made the deed. *28 H. 6. 3. 1 Sand. 291. R. Cro. El. 356. 1 Vent. 34. 136.*

A plea, that *A.* was jointly bound, is not good, without averring, that he is alive. *Lut. 696. Semb. 1 Sand. 291. 1 Sid. 238. 1 Vent. 34. R. Cro. El. 544.*

So it is not good, if he demur to the declaration generally, without a plea. *Semb. 1 Sid. 272. R. 1 Sid. 420. 1 Vent. 34. Gilbert v. Bath, H. 8 G. Str. 503.*

So in action against *A.* upon an obligation by *A.* and *B.* after a verdict for the plaintiff, he shall have judgment, though upon the declaration it appears, that *A.* and *B.* sealed it; for perhaps *B.* did not deliver it as his deed. *R. 2 Mod. Ca. 242.*

Vide ante (E. 12.)

(F. 9.) So if debt be brought against an heir in *gavelkind*, it may be pleaded, that there is another co-heir not named. *11 H. 7. 12.*

But against an heir on the part of the father, and an heir on the part of the mother, the writs ought to be several. *11 H. 7. 12.*

So against an heir and the executors. *18 Ed. 3. 4.*

(F. 10.) So if one executor or administrator be sued, it may be pleaded, Executor or administrator that there is another executor not named. *Rass. Ent. 325. a.* but it must be added, that the other has administered. *R. 1 Lev. 161.*

161. *D. 9 Co. 37. b. Clift. 15. R. in Exchequer, M. 13 Geo.*

Or another administrator not named. *Rast. Ent. 324. c.*

So if one executor or administrator be mis-named, the other may plead, that there is another executor (naming him by his true name) not named. *Tb. D. l. 11. c. 5. f. 15.*

So, though the other executor has given a release. *1 Ver. 31.*

And the plea, that there is another executor not named, is good, though it does not say, that the will is proved. *R. 2 Co. 37. b. 2 H. 5. 8. b.*

But the plaintiff by replication may say, that administration was granted at first to the defendant alone. *Rast. Ent. 324.*

So for an act done by one of the executors only, an action may be maintained against him alone; as in detinue of charters, when the charters came to the hands of one of the executors only. *Tb. D. l. 5. c. 12. f. 1.*

Dower was brought against one executor alone, as guardian, who possessed the ward alone. *8 Ed. 3. 420. Tb. D. l. 5. c. 12. f. 3.*

So if one of the executors die, the action shall be sued against the survivor alone, without joining the executors of the executor who died. *Tb. D. l. 5. c. 12. f. 5. R. 4 Leo. 193.*

*So where there is a real executor, and another hath administered in his own wrong, the writ may be brought against the real executor without naming the other. *Tb. D. l. 5. c. 12. f. 5.**

So an action shall be against the executor alone, without joining the heir. *18 Ed. 3. 4. Tb. D. l. 5. c. 12. f. 2, 7.*

Or terre-tenants. *27 Ed. 3. 80. Tb. D. l. 5. c. 12. f. 7.*

So if administration be granted in several dioceses or provinces, the action against the ordinaries shall be several. *11 H. 7. 12. Tb. D. l. 5. c. 13.*

Vide ante (E. 13, 14.)

(F. 11.) The King's Protection.

So the defendant may plead in abatement, or delay of the suit, the king's protection. *2 Brow. Ent. 106. 3 Lev. 332.*

Though the defendant does not come into the court till the exigent. *R. 3 Lev. 332.*

The protection of the king is for immunity from actions, &c. and this is of right: or for the safety of his person, servants, lands and goods, which is of grace. *Co. Lit. 132. a.*

The protection for immunity from actions is granted, *quia profecturus vel moraturus*, viz. when any one is going or staying out of the realm in the king's service; as a soldier, &c. or as an ambassador, envoy, &c. *Co. Lit. 130. a.*

Or, when any one is indebted to the king, who shall be paid before subjects. *Co. Lit. 130. a.*

Or, when any one in the king's service in war is imprisoned beyond sea. *Co. Lit. 130. a.*

The

The cause of the protection shall be always expressed in the protection. *Co. Lit.* 130. *a.* *Lat.* 197.

But by the common law, protection was not allowed, where a prejudice might happen by the delay, as in *quare impedit*, *darrein presentment*; for the danger of the lapse. *Co. Lit.* 131. *a.*

Nor in an assise, dower *unde nihil habet*. *Co. Lit.* 131. *a.*

Nor in an action depending upon them; as *quare non admisit*, a certificate of assise, &c. *Co. Lit.* 131. *a.*

Nor upon a writ of execution; as *elegit*, *capias ad satisfaciendum*, *feri facias*, &c. for the defendant hath no day in court. *Co. Lit.* 131. *a.*

So it does not lie, where the king alone is party. *Co. Lit.* 131. *a.*

Or, where the king and a subject are plaintiffs; as in a *decies tantum*. *Co. Lit.* 131. *a.*

Nor in an action that concerns the crown; as an appeal of felony, *maihem*, &c. *Co. Lit.* 130. *b.* 131. *a.*

If the party comes in upon the *capias utlagatum*. 3 *Lev.* 332.

So it does not lie for the demandant or plaintiff himself. *Co. Lit.* 130. *b.*

Nor, if granted after the commencement of the action. *Semb. Lat.* 197.

A protection ought to be under the great seal. *Co. Lit.* 131. *a.*

And shall be allowed or disallowed by the court where cast, be it of record or not. *Co. Lit.* 131. *a.*

And the court may disallow it, though there be a clause, that it shall not be argued. 2 *Inst.* 56.

(F. 12.) Several Tenancy.

So if an action be sued against several; it may be pleaded in abatement, that they hold severally. *Lut.* 11.

Or, that one of them holds parcel of the land in severalty. *Th. D. l.* 11. *c.* 31. *f.* 7.

As if a *precipe quod reddat*, or other real action, be brought against tenants in common. *Th. D. l.* 5. *c.* 3. *f.* 1. *c.* 4. *f.* 2. 27 *H.* 8. 30.

So in a *mort d'ancestor* several tenancy is a good plea, except where one is found tenant of the whole. *Th. D. l.* 11. *c.* 31. *f.* 2.

In a *nuper obiit*. *Th. D. l.* 11. *c.* 31. *f.* 2.

In a writ of *mesne*. *Th. D. l.* 11. *c.* 31. *f.* 4. *c.* 32. *f.* 4. 2 *H.* 5. 2.

In a writ of ward. *Th. D. l.* 11. *c.* 31. *f.* 6. 6 *Ed.* 3. 289.

In dower. *Th. D. l.* 11. *c.* 31. *f.* 9. *Lut.* 11.

In a *quid juris clamat*. *Th. D. l.* 11. *c.* 31. *f.* 10.

In a *scire facias*. *Th. D. l.* 11. *c.* 31. *f.* 11.

In a *formedon*. 2 *Leo.* 8. 5 *H.* 5. 4.

So in a real action against four, one of them shall plead, that he holds jointly with two, and that the third has nothing; though the others confess the action. 27 *H.* 8. 30. *Th. D. l.* 11. *c.* 31. *f.* 22.

(a)

(a) So in a *morta' ancestor* of rent-service, several tenancy in the land is a good plea. 8 *Aff. pl.* 35.

Otherwise if one of the tenants holds the whole of the demandant by this rent; though there are several tenants of the freehold. 8 *Aff. pl.* 35.

And otherwise of a rent-charge. *Th. D. l. 11. c. 31. f. 8.*

So in a *cessavit*, it is a good plea in abatement; that he holds of several lords.

Or, by several services. *Th. D. l. 11. c. 32. f. 1, 2.*

Or, this land with other land by the same service. 48 *Ed.* 3. 4. *Th. D. l. 11. c. 32. f. 3.*

But several tenancy is no plea in an assise. *Th. D. l. 11. c. 31. f. 3. R. 2 Leo. 8.*

Nor in a *per que servitia* against several upon a grant of services by fine. *Th. D. l. 11. c. 31. f. 5.*

Nor in an action against husband and wife. *Th. D. l. 11. c. 31. f. 12.* *as that the husband holds parcel in his own right and parcel in right of his wife. *Th. D. loc. cit.**

Nor in an attain. *Th. D. l. 11. c. 31. f. 13.*

Nor in a writ founded upon disseisin; as, in a writ of entry in the *per.* for the demandant may join another with the tenant of the land, to avoid a dilatory plea. *R. 2 Leo. 8.*

So if one tenant plead several tenancy, and pray aid of the other; the writ shall not abate, if the aid be granted. *Th. D. l. 11. c. 31. f. 14.*

If one tenant plead several tenancy to parcel, and the other not; the writ shall abate only as to that parcel. *Th. D. l. 11. c. 31. f. 21. 4 Ed. 4. 36. Con. 27 H. 8. 30. Acc. Dal. 106.*

But where they both plead several tenancy, which is acknowledged, it shall abate for the whole. *Th. D. l. 11. c. 31. f. 7.*

If the one plead this, and the other say nothing, it shall not abate. 38 *Ed.* 3. 23. *Th. D. l. 11. c. 31. f. 15.*

If a defendant plead sole tenancy to parcel, he ought also to plead over in bar, or to vouch. *Lut. 12. Acc. 12 H. 6. 4. b.*

If a man plead several tenancy to parcel, and vouch; the demandant must maintain his writ, though the plea do not conclude to the writ. 41 *Ed.* 3. 20. 42 *Ed.* 3. 16. *Th. D. l. 11. c. 31. f. 17.*

For when several tenancy is pleaded to parcel, the tenant ought to plead over to the action or vouch, and not conclude to the writ. *Per tot' cur'. 5 H. 5. 4. Lut. 11, 12. Th. D. l. 11. c. 31. f. 20.*

And the reason wherefore several tenancy abates the writ is, that the tenants cannot answer in common. *Per Finchd. 41 Ed. 3. 20. b.*

A man may plead several tenancy at the return of the *grand cape*, and wage his law of non-summons. 42 *Ed.* 3. 16. 38 *Ed.* 3. 33. *Th. D. l. 11. c. 31. f. 16.*

(a) This and the two following clauses are improperly penned; in the 2d, instead of *otherwise* it ought to be *but*, and the word *and* ought to be left out of the third, and to the second ought to be added, *yet the writ is good.*

If a man plead several tenancy, and plead over in bar; the demandant shall not answer to the bar, but shall be put to maintain his writ. *Th. D. l. 11. c. 31. f. 20. 12 H. 6. 4. b.*

But if the bar be ill, he may demur to it. *Th. D. l. 11. c. 31. f. 20. Semb. 12 H. 6. 5. a.*

(F. 13.) Entire Tenancy.

So in an action against several, the one may take the entire tenancy on himself, and demand judgment of the writ. *Th. D. l. 11. c. 33. Sav. 116.*

Or may take the entire tenancy upon himself as to part, and plead as to the other part. *Th. D. l. 11. c. 33. f. 5.*

In a writ against husband and wife, the husband may plead non-tenure for his wife, and take the entire tenancy upon himself. *9 Ed. 4. 38. [36.] Th. D. l. 11. c. 33. f. 15.*

In an action against several, each may take the entire tenancy upon himself. *Sav. 116. Vide Th. D. l. 11. c. 33. f. 16.*

Or the one may plead non-tenure, and the other take the entire tenancy upon himself, and plead and vouch over. *Aff. Ent. 393.*

But after wager of law of non-summions in common, no one can take the entire tenancy upon himself. *Th. D. l. 11. c. 33. f. 12.*

If each take the entire tenancy upon himself, and plead in bar, the demandant must maintain his writ; otherwise it shall abate. *Th. D. l. 16. c. 7. f. 55.*

But if the one take the entire tenancy upon himself, and the other plead non-tenure, the demandant need not maintain his writ. *37 H. 6. 18. [16.] Th. D. l. 16. c. 7. f. 54.*

Yet he shall be received to maintain it, if he will. *22 H. 6. 51. Th. D. l. 16. c. 7. f. 52.*

So if the one say nothing, and the other take the entire tenancy, the demandant need not maintain his writ. *Th. D. l. 11. c. 22. f. 45. 37 H. 6. 16.*

So in an assise, if each take the entire tenancy, and plead in bar, the plaintiff may choose either of them for his tenant; but if he, that is chosen, be not found tenant, the writ shall abate. *Th. D. l. 11. c. 37. Dy. 244. a. Sav. 116.*

(F. 14.) Non tenure.

So if the tenant plead non-tenure, the writ shall abate. *Cro. El. 559. Vide Aff. Ent. 10. Lut. 37. 851. b.*

So if he plead a special non-tenure; as, that he has common, and puts his cattle into the land as in his common, without that, that he has any other possession, and that such an one is tenant of the freehold. *8 H. 6. 35. [33.] Th. D. l. 11. c. 22. f. 41.*

That he has only for years, by statute, *elegit*, or other occupation, and that such an one is tenant of the freehold. *Th. D. l. 11. c. 22. f. 48.*

So by the common law, non-tenure of parcel abated the whole writ. 1 Mod. 181.

But now by the *stat. 25 Ed. 3. 16.* the writ shall abate only for that parcel.

Except in a *cessavit*, wherein non-tenure of parcel abates the whole writ since the statute; for the tenant cannot tender the arrearages for the whole demand. *Th. D. l. 11. c. 23. f. 29.*

So where the demand is of an entire thing, as a manor, &c. non-tenure of parcel abates the whole writ. *Pl. Com' 109. b. Th. D. l. 11. c. 23.*

But non-tenure is no plea in waste. *Th. D. l. 11. c. 22. f. 3. 29.*

Nor in an attaint generally. *Th. D. l. 11. c. 22. f. 5, 6, 17.*

Nor in error. 6 *Aff. pl. 6. 42 Aff. pl. 22. Th. D. l. 11. c.*

22. f. 7.

Nor in a *per quæ servitia*. *Th. D. l. 11. c. 22. f. 12.*

Nor in disceit to reverse a fine. *Th. D. l. 11. c. 22. f. 33.*

Nor in a *darrein presentment*. *Th. D. l. 11. c. 22. f. 34.*

Nor in a *post disseisin*. *Qu. F. N. B. 191. Th. D. l. 11. c.*

22. f. 39.

Nor in a writ of right *de rationabili parte*. *F. N. B. 9. Th. D. l. 11. c. 22. f. 40.*

Nor in a *nuper obiit*; for in this the privy of blood only is tried. *Kit. 140. Vide Th. D. l. 11. c. 22. f. 14.*

Nor in a *scire facias* upon a fine. *Kit. 140. b. Th. D. l. 11. c. 22.*

So general non-tenure is no plea in any *scire facias* to have execution in a personal action. *Kit. 140. b. R. 3 Lev. 205. Sal. 601.*

But a special non-tenure may be pleaded. *Kit. 141. a. 3 Lev. 205. Sal. 601.*

So the non-tenure ought to be at the time of plea; for it is not sufficient *quod non tenuit tempore impetrationis brevis*, or of the summons. *Vide Post. (O.) Vide Th. D. l. 11. c. 23. f. 10.*

So if he was tenant at the time of the writ purchased, it is sufficient; though he alien afterwards.

If a man plead non-tenure generally, he shall not shew who is tenant. 6 *Ed. 3. 249. Th. D. l. 11. c. 22. f. 4. R. 1 Mod. 181.*

Otherwise, if he plead a special non-tenure. *Vide 1 Mod. 181.*

So if he plead non-tenure, but that such a one is tenant, it is sufficient, though he be not; for he shall answer to the non-tenure, not to the tenant named. *Dal. 101.*

So if he plead non-tenure *die impetrationis brevis origin' sed eodem die* such a one was tenant, it is sufficient. *R. 1 Mod. 181.*

So if he plead non-tenure of a rent, he shall say, that he is not pernor of the rent, nor tenant of the land out of which, &c. *Th. D. l. 11. c. 22. f. 44. 5 Ed. 4. 22.*

[In *formedon* it must be pleaded in *abatement*. Barnes 332.]

So in a *formedon* of land, if the party plead non-tenure, it is not sufficient, without saying, nor pernor of the profits. *Th. D. l. 11. c. 22. f. 49. 3 H. 7. 13. 4 H. 7. 18. Vide Lut. 37. and 1 Mod. 181.*

So if he plead non-tenure of parcel, he shall shew who is tenant of it. *Kit. 140. a. R. 1 Mod. 181.*

If he plead non-tenure, where he made a feoffment by covein to defeat the action; it shall be found for the demandant. *R. Cro. El. 233. Sav. 126.*

If he plead non-tenure for 100 acres, it is sufficient; without saying in what vill. *R. 1 Mod. 181.*

If the defendant plead non-tenure, the plaintiff may reply, *quod tenet*, *Ast. Ent. 10. Lut. 38. R. 3 Lev. 330.*

But if one defendant plead non-tenure, and the other takes the entire tenancy, the plaintiff need not maintain his writ; for there shall be no judgment upon the plea of non-tenure. *Th. D. l. 11. c. 22. f. 45.*

And by the *stat. 25 Ed. 3. 16.* by plea of non-tenure of parcel, no writ shall abate, but as to that parcel. *Reg. 228. b.*

In dower, if the tenant plead non-tenure of parcel, and that he is ready to render the remainder; the demandant may choose either to have judgment for that which is rendered, or to maintain his writ for the whole. *9 Ed. 3. 480. Th. D. l. 11. c. 23. f. 9.*

So if the defendant plead non-tenure, the plaintiff may maintain his writ in dower, *formedon, scire facias*, &c. where no damages are recoverable; as well as in cases, where damages shall be recovered. *R. 3 Lev. 331.*

Upon a plea of non-tenure, if it be found for the defendant; judgment shall be, that the defendant go quit: but the demandant may enter.

(F. 15.) Disclaimer.

So if the tenant disclaims in a writ of customs and services, the writ shall abate; but an action accrues to the demandant by a writ of right upon the disclaimer. *Th. D. l. 11. c. 34. f. 2.*

So in a *nuper obiit*, if the tenant disclaims in the blood, the writ shall abate. *11 H. 7. 14. Vide Th. D. l. 11. c. 34. f. 7.*

In a *quare impedit*, if the defendant disclaims, the plaintiff shall have a writ to the bishop. *Th. D. l. 11. c. 34. f. 21. 6 Ed. 3. 249.*

In a *formedon* against two, if one disclaims, and the other makes default; the demandant shall have judgment for the whole against him that made default. *33 H. 6. 53. Th. D. l. 11. c. 34. f. 16.*

So if one makes a disclaimer, and the other pleads non-tenure; the judgment shall be, that the demandant shall take nothing by his writ, but he may afterwards enter. *Th. D. l. 11. c. 34. f. 17.*

In a writ against jointenants, if one disclaims, the whole vests in the other; for the disclaimer is a disagreement to the purchase upon record. *Th. D. l. 11. c. 34. f. 14.*

Otherwise, where they are jointenants by fine. *Qu. per Shard. Th. D. l. 11. c. 34. f. 14.*

But in a writ against two, if one disclaims, the other cannot disclaim also; for it cannot vest in no body. *Th. D. l. 11. c. 34. f. 15.*

So in a *cessavit*, the tenant cannot disclaim. *Th. D. l. 11. c. 34. f. 3.*

So

So in an assise for rent-service, the tenant cannot disclaim to hold of the plaintiff. *Th. D. l. 11. c. 34. f. 6.*

So in *per qua servitia*, the tenant cannot disclaim to hold of the conuor. *Th. D. l. 11. c. 34. f. 11.*

So no one can disclaim, who is not charged as terre-tenant. *11 H. 7. 14.*

An abbot cannot disclaim. *Per Prisot. 36 H. 6. 36. [34.] Th. D. l. 11. c. 34. f. 20.*

Nor an infant. *36 H. 6. 36. [34.] Th. D. l. 11. c. 34. f. 20.*

So the husband cannot disclaim for his wife. *Th. D. l. 11. c. 34. f. 12. 20. 36 H. 6. 36. [34.]*

If the tenant disclaims, the judgment shall be, that the tenant go without day. *Lit. f. 691.*

And after such judgment the demandant may enter. *Lit. f. 691.*

And upon a disclaimer, the demandant cannot maintain his writ, that he is tenant; except where damages are to be recovered; for then he may, for the recovery of his damages. *R. Co. Lit. 362. b. Adm. 3 Lev. 330.*

So if non-tenure be pleaded with a disclaimer. *3 Lev. 331.*

So if one pleads non-tenure, and the other disclaims. *3 Lev. 331.*

(F. 16.) Demandant himself seised.

So the tenant may plead, that the demandant himself was seised at the day of the writ purchased. *Th. D. l. 11. c. 35. f. 1, 18.*

Or, that the demandant was seised of parcel. *Th. D. l. 11. c. 35. f. 4, 6.*

So in waste against tenant for life. *Th. D. l. 11. c. 35. f. 5.*

So in assise for rent, that the plaintiff was seised of the land out of which, &c. *Th. D. l. 11. c. 35. f. 9.*

So in dower *unde nihil habet*. *Th. D. l. 11. c. 35. f. 2.* But by *stat. W. 1. 3 Ed. 1. 49.* This is no plea in dower *unde nihil habet*, unless the plaintiff has parcel of her dower by the assignment of the tenant himself.

And this plea may be to the writ, or to the action. *Th. D. l. 11. c. 35. f. 20.*

But it is no plea in an action upon the *stat. 8 H. 6.* for a forcible entry. *Per Newton. 22 H. 6. 42. [37.] Th. D. l. 11. c. 35. f. 16.*

Nor in trespass, that the plaintiff was possessed of the goods taken. *Th. D. l. 11. c. 36. f. 2.*

Nor in *replevin*. *Th. D. l. 11. c. 36. f. 3.*

(F. 17.) Misnomer.

[If defendant is served by wrong name, appears by his true name, and plaintiff declares against him by that name, the court will not on motion stay proceedings for irregularity; but leave defendant to plead variance. So if it is in the addition of his degree or mystery. *Hole v. Finch, Jackson v. Doleman, H. 9 G. 2. 2 Wils. 393.*]

So

(F. 17.) So the defendant may plead in abatement, that his name of baptism is mistaken. *Lut.* 10.

[If defendant is sued by a wrong christian and surname, he may plead it in one plea. and it is not double. *Read v. Matteur*, T. 9 G. 2. B. R. H. 286.

Defendant need not aver that he was baptised by his christian name, only that it is his name, and by that name he was always called, &c. *Ibid.*]

Or in an action against husband and wife, that his wife was misnamed. *Reg. pl.* 289. 30 *Aff. pl.* 16. But the husband must likewise answer for himself. *Tb. D. l. 11. c. 5. f. 17.*

Though the defendant is known by the name by which he is sued. *Tb. D. l. 6. c. 2. f. 9.* *Contra*, for he ought to plead, that he was baptised, and known by such a name, for to say, that he was baptised, without saying, and known, is not sufficient. *R. Mod. Ca.* 116. 1 *Sal.* 6.

So to say, that he was known by such a name is sufficient, though never baptised. *Ibid.*

So a plea, that he was baptised by the name of *A. absque hoc*, that he is known by the name of *B.* is a good traverse. *R. Powel, J. cont. Mod. Ca.* 116. 1 *Sal.* 6.

But the defendant may be sued by his name of confirmation. *Co. L.*

And an abbot may be sued in a real action without his name of baptism. *Tb. D. l. 6. c. 2. f. 2.*

So in a *replevin*. *Ibid.*

In an annuity. *Tb. D. l. 6. c. 2. f. 5.*

In an ejectment of ward. *Tb. D. l. 6. c. 2. f. 5.*

And in a *cessavit*. *Tb. D. l. 6. c. 3. f. 2.*

But in a plea personal, where process of outlawry lies, an abbot ought to be named by his proper name; as in trespass. *Tb. D. l. 6. c. 2. f. 3, 7.*

Scire facias upon a recognizance lies against executors, without naming them by their proper names. *Tb. D. l. 6. c. 2. f. 4.*

One defendant cannot plead a misnomer of the other. *Per Seton.* 30 *Ed.* 3. 22. [17. b.] 14 *H.* 6. 3. *R. Lut.* 36. *Vide Tb. D. l. 11. c. 5. f. 8.*

And by a misnomer of one, the writ does not abate as to all. 8 *Co.* 159. b. 27 *H.* 8. 26. b. *Vide Post.* (N.)

In a plea of misnomer it is not well to say, *venit prædictus W. D.* for by the (*prædictus*) he affirms his name as it is in the writ. *Lut.* 10. *R.* 1 *Sho.* 394.

[Nor if the plea begins, And the said A. B. who is sued by the name of C. D. *Jackson v. Ford*, P. 13 G. 3. 3 *Wilf.* 413.]

Nor that the defendant is *eadem persona versus quam*, &c. *Lut.* 10.

[If defendant pleads *misnomer*, but his plea and affidavit are intituled by the wrong name, his plea shall be set aside. *Barnes* 348.]

Vide Ante, (E. 18.)

(F. 18.) So a defendant may plead in abatement, that his surname is mistaken. *Aff. Ent.* 1. *Reg. pl.* 288.

That

That his surname is *Symms*, *absque hoc*, that he was known by the name of *Symonds*. 4 *Mod.* 347.

That it was *Wesley*, and not *Westby*, *alias Westly*. *Per three justices in B. R.* in an information by the *Attorney General* against *W. F.* 4 *Geo. fort. contra.*

If an obligation be by *A.* by the name of *B.* and he, being sued by the name of *B.* pleads misnomer; the plaintiff may estop him by saying, that he made the obligation by the name of *B.* and demand judgment, if against his own deed he shall be admitted to say, that his name is *A.* to which the defendant, without *oyer* of the obligation, may say, *non est factum*. *Mod. Ca.* 225.

But the plaintiff by replication may say, that the defendant is known by the one name, or the other. *Ast. Ent.* 1. *Th. D.* l. 6. c. 2. f. 1. *Semb.* 4 *Mod.* 347.

And it is sufficient if the proper name be joined with a sufficient description; as, *A.* the son or daughter of *B.* *Vide Th. D.* l. 3. c. 2. f. 6, 7, 8. l. 6. c. 2. f. 2.

A. the wife of *B.* *Vide Th. D.* l. 6. c. 2. f. 6.

Or with a name of dignity. *Vide Th. D.* l. 3. c. 3. f. 5. l. 6. c. 3. f. 12. *Vide Dav.* 60. a.

Misnomer shall not be pleaded by attorney, but in proper person. *Lut.* 11. *Vide Post.* (J. 17.)

Nor shall the defendant say *predict' D.* or *quæ est eadem persona*, &c. *Vide ante* (F. 17.)

Nor shall one defendant plead misnomer of the other. *Lut.* 36.

So a man who appears *gratis*, where the sheriff returned upon a *capias*, *non est inventus*, shall not plead misnomer; for he cannot be intended the person sued, except where he comes in upon a *cepi corpus* or *exigent*. 27 *H.* 8. 1.

So if the defendant says, that he was baptized, he ought to add the place where he was baptized. *R. Skin.* 620.

Or that he was baptized by another name, he ought to add, that he was known by such name, at the time of the writ. *R. Skin.* 620.

Vide Ante (E. 19.)

So a defendant may plead in abatement, if his name of dignity (F. 19.) be omitted or mistaken; as, if an earl be not named so. 39 *Ed.* In name of

3. 35. b. 22 *Aff. pl.* 24. *Dav.* 60. a. *Th. D.* l. 6. c. 3. f. 6. dignity.

l. 3. c. 3. f. 8.

Or a duke, marquis, &c.

Archbishop, bishop. 27 *H.* 6. 5. b.

Duchess, countess, &c.

Or if a countess dowager is not named *dotissa*. *Semb. Per Pemb.* *Skin.* 15.

Knight. *R. Mod. Ca.* 105. *Vide Th. D.* l. 3. c. 3. f. 14.

Master of an hospital. 2 *Ed.* 3. 47. *Th. D.* l. 6. c. 3. f. 3.

If garter king at arms be not so named. *R. Cro. El.* 224. *Dub.* in an action that does not concern his office. *Cro. El.* 542. *Ow.* 61.

[If *Clarencieux* king at arms is not so named, though in an action which does not concern his office. *Holt v. Ward*, *M.* 3. G. 2. *Str.* 850.]

If a baronet be not so named. *Hob. 129. Clift. 17. R. 1 Vent. 154.*

So in an action against the executor of *B. Arm.* where he was a knight; the writ abated, tho' he was only *Arm.* at the time of the bond given. *Bro. bre. 513.*

If he be named baronet only, where he is a knight and baronet. *R. Carth. 14.*

But gentleman, or esquire, are not names of dignity. *14 H. 6. 15. Th. D. l. 6. c. 3. f. 9.*

Nor dean, archdeacon, or præcentor. *Th. D. l. 6. c. 3. f. 1. 8. R. 27 H. 6. 5. b. Vide Th. D. l. 3. c. 3. f. 6. 17.*

Nor provost. *17 Ed. 3. 1. Th. D. l. 6. c. 3. f. 14.*

But a dignitary of another kingdom need not be named by his name of dignity. *Mar. pl. 26. Dav. 60. a. Vide Th. D. l. 3. c. 3. f. 7.*

Or if a name of foreign dignity be added, it does no harm. *Semb. 3 Lev. 42.*

Yet if he be a knight, he shall be so named, though he is an earl of another kingdom. *Mar. pl. 26.*

So if he be deprived of his dignity; as, if a deanry be dissolved by an act of parliament. *4 H. 7. 6. Vide Th. D. l. 3. c. 3. f. 16. l. 6. c. 3. f. 10.*

Though the deprivation was *minus jure*; for it stood in force till restitution. *13 Aff. pl. 2. Th. D. l. 6. c. 3. f. 15.*

So if a suit be to avoid the dignity; as, if the king brings a *quare impedit* of a priory, the defendant need not be named prior. *14 H. 4. 36. Th. D. l. 6. c. 3. f. 4.*

So if the defendant has a name of dignity given to him, when he has no such dignity, it may be pleaded in abatement; as, if he be named knight and baronet, when he is not a baronet. *Reg. pl. 287.*

Or, when he is not a knight. *R. 1 Vent. 154.*

Or be named by a name of dignity, which is lost by marriage. *Vide Dy. 79. b. Ow. 81.*

Or the eldest son of a duke, &c. be named marquis, &c. *Sal. 451. Semb. Ow. 82.*

If one be named knight, when he is a baronet. *R. Jon. 346.*

But if the defendant appear by such name, he shall not take advantage of the misnomer. *R. 2 Rol. 88. Adm. 1 Vent. 154. R. 1 Rol. 450.*

If the defendant be named by his proper name, and name of dignity in the first part of the writ; it is sufficient, if he be named by his proper name only in the other parts of the writ. *Semb. Th. D. l. 6. c. 3. f. 12, 13.*

If the defendant does not plead, that he was a knight, &c. at the time of the bill or writ, it is ill. *R. Mod. Ca. 105.*

If the defendant be named *Domina*, &c. when she ought not in any other part of the pleading except in the writ, it does no harm. *Dy. 79. b. in Marg.*

A mistake in a name of dignity shall not be amended. *1 Vent. 154. R. Hob. 129.*

Where

Where a writ shall abate for a mistake in the name of dignity of the plaintiff, *Vide ante* (E. 20.) where by an acceptance afterwards, *Vide Post.* (H. 44.)

So if a man has a cause of action against another by reason of his office, he ought to name him by the name of his office; as, against a sheriff, collector. 15 *Ed.* 4. 27. *Vide Th. D. l. 6. c. 4. f. 4.* (F. 20.) In name of office.

So if land be demanded against a parson, which he holds in right of his church, he ought to name him parson. *Th. D. l. 6. c. 6. f. 1. 7.*

If dower be demanded against a guardian, he ought to name the defendant guardian. *Th. D. l. 6. c. 7. f. 1, 3.*

So an assise against the warden of a chapel, ought to name the defendant warden. 13 *Aff. pl. 2.* 15 *Aff. pl. 8.* *Th. D. l. 6. c. 7. f. 6.*

So an action against a man as heir, ought to name him heir. *Th. D. l. 6. c. 9.*

And an action against an executor, ought to name him executor. *Th. D. l. 6. c. 11.*

And the defendant may plead, that he is administrator, and not executor. 1 *Leo.* 69. *Vide in Pleader* (2 D. 4.)

So the defendant, being sued as administrator, may plead in abatement, that he is executor, and not administrator. *Vide Th. D. l. 6. c. 11. f. 9.* *Vide in Pleader* (2 D. 12.)

How it shall be pleaded. *Vide Lut.* 29. *Vide Pleader* (2 D. 4. 2.)

So being sued as administrator, he may plead, that he is only administrator *durante minori etate.* *Lut.* 20.

If a *feme covert* be executrix, the action ought to be against the husband and her *executricem*, &c. 18 *H.* 6. 4. *Th. D. l. 6. c. 11. f. 8.*

If a *feme-covert* and a stranger are executors, it ought to be against the stranger executor, and the husband and wife, *executric' test'i præd'*, &c. 1 *Ed.* 4. 2. *Th. D. l. 6. c. 11. f. 8.*

If an action be against an administrator *durante minori etate* of A. executor to B. it is well; though he is suable only as administrator *de bonis non* to B. *R. Hob.* 246.

Otherwise if the cause of action be not by reason of his office; as, in trespass against a parson, there is no need to name the defendant parson. 11 *H.* 4. 40. *Th. D. l. 6. c. 6. f. 4.*

(a) Nor in debt. 13 *H.* 4. 2. *Th. D. l. 6. c. 6. f. 4.*

In a *quare impedit* to present to a church, which the defendant claims as annexed to his prebend, it is not necessary to name him prebendary. 7 *Ed.* 3. 302. *Th. D. l. 6. c. 6. f. 8.*

Or, in a *quare impedit* against one who claims the advowson as guardian, it is not necessary to name him guardian. 9 *Ed.* 3. 465. *Th. D. l. 6. c. 7. f. 4.*

Nor in a *darrein presentment.* *Th. D. l. 6. c. 7. f. 4.*

(a) *Tbelfall's Digest*, l. 6. there are two chapters second in some copies, which is likely to cause a variance in the citing of the remaining chapters as in the several clauses here following.

Or,

Or, if the action be to avoid the office; as, in assise against the warden of a chapel. 10 H. 7. 18. *Tb. D. l. 6. c. 7. f. 7.*

So, where the ground of the charge upon the defendant otherwise appears at large in the count, the defendant need not be named by his office; as, in debt against the ordinary, it is not necessary, that he be named ordinary; for the count shews, *quod bona defuncti ad manus, &c. devener'*. 35 H. 6. 42. *Tb. D. l. 6. c. 4. f. 3.*

In an action against an innkeeper, it is not necessary to name him innkeeper; for the count shews, that he is a common innkeeper, or keeps a common inn. 22 H. 6. 24. [21.] 11 H. 4. 45. *Tb. D. l. 6. c. 5. f. 2.*

In debt against an heir, there is no necessity to name him heir; for by the count is shewn, that it was the lien of the heir. *Tb. D. l. 6. c. 9. f. 1. Cont. Ibid. f. 2.* And the register names him heir in the writ. *Vide Reg. 140. a.*

In an action against an executor, it is sufficient, if the declaration shew him to be executor, though he is not named executor in the writ. *Vide Pleader (2 D. 2.)*

Vide Ante (E. 21.)

(F. 21.) So in actions where a man may be outlawed, the defendant may plead in abatement, that there is *B.* the elder and *B.* the younger, and that he is the younger; as, in account, &c. *Tb. D. l. 6. c. 13. f. 3.*

So in an assise. 22 *Aff. pl. 14. Tb. D. l. 6. c. 13. f. 2.*

So in a suit against a corporation, that there is a prior in *W. de freres preachers*, and a prior *de nostre dame*. 25 *Ed. 3. 48. 29 Aff. pl. 70. Tb. D. l. 6. c. 13. f. 5.*

Or, if the defendant offers himself ready to answer, and the plaintiff says, that he is not the same person, and does not shew the diversity of names; the writ abates. *Tb. D. l. 6. c. 13. f. 1. 8 Ed. 3. 20. a.*

But the plaintiff may give the addition of younger, and enter it upon the roll, and the writ shall not abate. *Tb. D. l. 6. c. 13. f. 7, 8.* when the defendant himself appears, who is sued without the addition. *R. 44 Ed. 3. 34. b.*

So if a stranger appears, (not being the son of the person sued) and says, that he is the younger; where the plaintiff says, that he is not the person sued. 39 H. 6. 46.

In a *præcipe quod reddat*, dower, &c. diversity of names is no plea; for the tenant may disclaim. *Tb. D. l. 6. c. 13. f. 2.*

Nor when the same person, who is sued, appears. 39 H. 6. 48. 27 H. 8. 1. *Tb. D. l. 6. c. 13. f. 9.*

Nor in an indictment; for the name cannot be changed but by the jury. 9 H. 4. 3. *Tb. D. l. 6. c. 13. f. 6.*

Nor in an action upon an obligation or specialty; for it is ascertained by his deed. *R. 9 H. 7. 21. b.*

It is not necessary to give diversity of names to the plaintiff. 18 *Ed. 3. 4. 32 H. 6. 33. Tb. D. l. 6. c. 13. f. 10.*

So there is no need of the addition of elder or younger, except where there is a father and son of the same name. *Semb.*

per Moile. 33 H. 6. 53. 4. *Acc.* 39 H. 6. 46. a. *Tb. D. l.* 6. c. 13. f. 9.

So where the defendant himself appears, he cannot abate the writ for want of the addition of younger. 44 *Ed.* 3. 34. b. *Per Prifot.* 39 H. 6. 46.

And the writ shall not abate for incertainty of the names of those who are not parties to it. 7 *Ed.* 3. 302. *Tb. D. l.* 6. c. 13. f. 11.

So the writ abates not, if at the day given for waging of law, *A. B.* the younger comes to wage his law, and the plaintiff says, that he is not the same person; for he sued *A. B.* the elder. *Dub.* 5 *Ed.* 4. 23. 114.

So any addition, that shews the diversity of person, is sufficient; as, executor of another vill, &c. *Per two Juslices, Moile cont.* 39 H. 6. 47.

So if one of them be, *in custodi' mar' in B. R.* *R.* 1 *Sal.* 7.

So if a man had given any addition to the name of the defendant, and that was mistaken; it might have been pleaded in abatement at the common law. (F. 22.) Addition to the name.

As, if the defendant was named *A. B.* of *P.* he might say, that he was *A. B.* of *D.* and not of *P.* 11 H. 6. 13. [11.] By the common law. 21 H. 6. 54. b. 9 H. 5. 8.

So if he was named *A. B. smith*; he might say, that he was *A. B. carpenter*, not *smith*. 21 H. 6. 54. b. *Tb. D. l.* 6. c. 17. f. 2. *Vide ante* (E. 22.)

Or, *A. B. fishmonger*, that he was *A. B. gent. per Passan.* 19 H. 6. 51.

So if he was named by his proper name and surname, with the addition of his office, &c. it might have been pleaded, that he was not such officer, when the being such an officer is material to the action.

As, if he be named parson of *A.* the writ shall abate, if he was not parson the day of the writ purchased, nor ever since. *Tb.* *D. l.* 6. c. 6. f. 2, 3.

Or, if he was parson but of a moiety of the church. 18 *Ed.* 3. 33. *Tb. D. l.* 6. c. 6. f. 2.

Or, if he was parson of *B.* in which parish *A.* was a chapel, and not the parish church. 18 *Ed.* 3. 44. *Tb. D. l.* 6. c. 6. f. 2.

But if the addition was immaterial, a mistake cannot be pleaded in abatement; as, in an action against *A. B. citizen of T. one of the company of M.* it is no plea, that he was not of the company. 38 *Ed.* 3. 40. [34]

Or, against *J. N. attorney of Peter de Medicis*; it is no plea, that he was not his attorney. 38 H. 6. 24. *Fitz. Brief* 139. *Tb. D. l.* 6. c. 17. f. 3.

Or, against *M. B. dominam de B.* when she is not a lady. 8 H. 6. 10. a.

So any difference is sufficient to distinguish two of the same name. If an action be brought against *A. B. of C.* where there is a father

a father and son there of the same name, *in custodia mar'* it is sufficient to distinguish, without saying senior or junior. *R. 1 Sal. 7.*

So if the defendant acknowledge himself to be the person who was sued, it is no plea, that the addition was mistaken: as, if he be named *A. B. of P.* it is no plea, that he lives at *D.* but he ought to say, that his name is *A. B. of D.* and not of *P.* *Th. D. l. 6. c. 17. f. 2, 5.*

So if the defendant appears, a bad addition, or want of an addition, will be aided. *Per Keel. 1 Sid. 247.*

So if one give a bail-bond by such a name, he shall be estopped to say, that that is not his name. *1 Sal. 7.*

But the estoppel ought to be pleaded; for the defendant may plead misnomer; the plaintiff shall say, that he made the bond by such a name; to which without *oyer*, he may say *Non est factum.* *R. 1 Sal. 7.*

So if one give bail, that is an appearance; and a misnomer or bad addition, &c. shall be aided. *1 Sal. 8.*

Yet if the plaintiff reply, *Quod imposuit commune ballium per nomen*, &c. this is no estoppel; for the putting in bail is the act of the court, and ought to be pleaded as an appearance. *1 Sal. 8.*

(F. 23.)
By the stat.
1 H. 5. 5.
When necessary.

By the *stat. 1 H. 5. 5.* In original writs of pleas personal, appeals, and indictments, additions shall be made of the defendant's estate, degree, or mystery, &c. of the towns, hamlets, or places, and counties, where the said defendants were or be: and if omitted, the outlawry thereon shall be void, or the said writs and indictments may be abated by exception of the party. Provided that they be not abated for the surplusage of such additions.

And therefore, there ought to be an addition of the place, as well as of the degree, &c. *Lat. 169.*

An addition is necessary in all writs original in actions personal, appeals, and indictments upon which the defendant may be outlawed.

So in a presentment before the coroner; for outlawry lies upon it, and it shall be taken as an indictment. *R. 2 Leo. 200.*

(F. 24.)
When not
necessary.

But in an assise, no addition is necessary; for it is a real action; though if the disseisin be found with force, a *capias* and *exigent* lie for the king for the fine. *9 Aff. pl. 1. 9 Ed. 3. 449. 7 H. 4. 39. Th. D. l. 6. c. 16. f. 2.*

So in *replevin* and *recordare*, no addition is necessary, though a man may be outlawed. *Th. D. l. 6. c. 16. f. 3. 1 Sal. 5. Mod. Ca. 85.*

Nor in *rescous* returned by the sheriff, though process of outlawry lies upon it. *Th. D. l. 6. c. 16. f. 4.*

Nor if a man let to bail does not keep his day, whereby a *capias* and *exigent* issue against the bail, there is no need of any addition. *Th. D. l. 6. c. 16. f. 4.*

Nor in a *homine replegiando.* *R. Mod. Ca. 84. 1 Sal. 5.*

Nor in any writ, that is *vicontiel.* *Per Powel. Mod. Ca. 85. 1 Sal. 5.*

Nor in an action by bill. *1 Sal. 7.*

So in an action against husband and wife, there is no necessity for

for any addition to the wife; for she shall be intended of the same place as her husband. 3 Ed. 6. 31. b. 2 Leo. 183.

So in an action against an abbot, and his monk, there needs no addition to the monk. 3 H. 6. 31. b.

So in an indictment against a *feme-covert*, as the wife of *A.* no other addition of place or mystery is necessary. Per 2 J. Gawdy cont. Cro. El. 198.

So, when process of outlawry does not lie, no addition is necessary; as, in an indictment for encroaching upon an highway. R. Cro. El. 148. R. 8 H. 6. 9. b.

[So in an information in the nature of a *quo warranto*, for there is no process of outlawry on it, as there is on *quo warranto* by original writ. Rex v. Brough. H. 22 G. 2. 1 Wilf. 244.]

In an action in an inferior court. R. Mo. 354.

So in a *decies tantum*; for there process of outlawry lies not. 21 H. 6. 54. b. 8 H. 6. 9. b.

Nor in *detinue* of charters. 19 H. 6. 51. a.

In the case of common persons, the addition of place, and county is usually put before the addition of estate, degree, or mystery. Th. D. l. 6. c. 14. f. 3. (F. 25.) What addition is good Of place.

Otherwise, in the case of persons of dignity. Th. D. l. 6. c. 14. f. 4.

A man may be named of a vill, hamlet, or other place. So of a parish, that has not divers villis. Th. D. l. 6. c. 14. f. 20.

If a man be of a hamlet within a vill, he may be named either of the hamlet or of the vill, at the election of the plaintiff. 35 H. 6. 30. b. Th. D. l. 6. c. 14. f. 14.

If a man resides in one vill, and has a family in another, he may be named of the one or of the other, at the election of the plaintiff. 19 H. 6. 1. Th. D. l. 6. c. 14. f. 15.

[The place where defendant is *conversant* is sufficient, though not *commorant*, nor *inhabitant*. Barnes 162.]

[Plea as to commorancy may be demurred to, but not set aside. Barnes 338.]

If he removes from one vill to another, he may be named late of the former, or of the latter, at the election of the plaintiff. 19 H. 6. 1. 33 H. 6. 9. Th. D. l. 6. c. 14. f. 15.

If a man be of a city, which is a county within itself, it is sufficient if he be named of the city; as of *London*, without saying of what ward, or parish. Th. D. l. 6. c. 14. f. 8.

But the addition of a county only is not sufficient, without mentioning some vill in the same county. R. 2 Cro. 616.

So if a man has a family at *G.* and dines at *W.* he may be named of *W.* Dub. 1 Sid. 325.

If a man be named rector of the church of *T.* in such a county, it is sufficient without saying of what place; for he shall be intended resident upon his church. 7 H. 6. 1. b. 10 H. 6. 8. Th. D. l. 6. c. 14. f. 7.

So *A.* chancellor of the university of *Oxford*, in the county of *Oxford*, is sufficient, without saying of *Oxford*. 8 H. 6. 38. [37.] Th. D. l. 6. c. 14. f. 13.

But

But the addition of a parish is not good ; if there are divers vill^s in the same parish. 35 H. 6. 30. *Th. D. l. 6. c. 14. f. 20.*

Nor the addition of an hundred or foken ; where there are divers vill^s. *Th. D. l. 6. c. 14. f. 20.*

Nor of any great place containing divers vill^s. 5 Ed. 4. 1. *Th. D. l. 6. c. 14. f. 21.*

The place ought to be annexed to the person of the defendant ; and therefore, if the addition be after the *alias dictus*, it is not sufficient. *Th. D. l. 6. c. 14. f. 19. R. Cro. El. 198. R. Mo. 354. 2 Leo. 183.*

Yet if a man be named *A. B. alias dictus D.* the addition after the *alias* is good. 5 Ed. 4. 141.

So *A. B.* servant to *J. Noke* of *D.* in the county of *M.* butcher, is not good ; for the addition shall be referred to *J. Noke*. 6 Ed. 4. 3. 9 Ed. 4. 50. [48.] *Dy. 46. b. Th. D. l. 6. c. 14. f. 10.*

Yet, *A. B.* who was the wife of *N.* of *D.* was good ; for the addition shall be referred to the wife, and not to the husband, who was dead. 4 H. 6. 4. *Th. D. l. 6. c. 14. f. 9.*

But where the addition is not proper to the wife ; as, yeoman, &c. it shall be referred to the husband. *R. Dy. 46, 7.*

If there be no such vill, or place, as mentioned in the addition, the defendant may say, *Null tiel vill.* 8 Ed. 4. 5. *Reg. pl. 284, 286.*

Or, that he is of *D.* and not of *P.* 8 Ed. 4. 5. *Th. D. l. 6. c. 14. f. 22.*

Or, that there are two *D.*'s and none without an addition. *Th. D. l. 6. c. 14. f. 23. Reg. pl. 285.*

If the defendant plead, that he was not of the place mentioned in the addition, it is not sufficient without saying of what place he was. *Th. D. l. 6. c. 14. f. 11.*

And he ought to say, that he was not of that vill the day of the writ purchased, nor ever since. *Per Martin. Strange cont. Th. D. l. 6. c. 14. f. 12. 8 H. 6. 9. b. Agr. 2 Ed. 4. 15. Cont. Fitz. Brief 944. Acc. Mo. 70.*

On special original against *A. nuper de London*, merchant, he pleaded he had for four years been commorant at *B.* and traversed, that at the time of the writ, *vel nuper tunc, vel unquam poslea*, he was of *London*, and made affidavit ; but the plea was set aside. *Cortijos v. Munoz, H. 5 G. 2. Str. 924.*

But if he plead, that he was of *D. parva*, and not of *D.* without an addition ; it is sufficient, without saying, that *D. parva* was a vill by itself, and *D.* another vill by itself. *Th. D. l. 6. c. 14. f. 14.*

(F. 26.)
Of estate,
degree, or
myltery.

The addition of the estate is good ; as, widow, single woman. 10 H. 6. 22. [21.] 14 Ed. 4. 8. [7.] *Th. D. l. 6. c. 15. f. 4.*

Labourer. 3 H. 6. 31. b. 5 Ed. 4. 33. *Th. D. l. 6. c. 15. f. 1.*

Parson, clerk.

Wife. 2 Leo. 183.

Servant

Servant to *A. B.* *Mod. Ca.* 58. 3 *H. 6.* 31. *b.* *Th. D. l.* 6. *c.* 15. *f.* 1.

So the addition of the degree; as, duke, earl, &c. *Th. D. l.*

6. *c.* 15. *f.* 12.

Serjeant at law, knight. 1 *Sal. 6.* *Th. D. l.* 6. *c.* 15. *f.* 12.

Esquire, yeoman, gentleman. *Rast. Ent.* 108. *Th. D. l.* 6. *c.* 15. *f.* 6.

Alderman.

Doctor, archdeacon, dean, &c.

Though it be a degree in another kingdom; as, bishop of *D. in Ireland.* 21 *H. 6.* 3. *b.* *Th. D. l.* 6. *c.* 15. *f.* 8.

So the addition of his mystery, art or trade; as, merchant. 4 *H. 6.* 26. *b.* *Th. D. l.* 6. *c.* 15. *f.* 2.

Mercer. 5 *Ed. 4.* 33. *Th. D. l.* 6. *c.* 15. *f.* 2.

Chopchurch, brogger. 9 *H. 6.* 65. *Th. D. l.* 6. *c.* 15. *f.* 3.

Husbandman, schoolmaster. 2 *Leo.* 186.

Grocer, taylor, tanner, currier, shoemaker, chapman, &c.

Spinster, &c. *Dy.* 46. *b.*

Scrivener. 2 *Leo.* 186.

But the addition of office is not good; as, servant; unless it be said, the servant of such an one. 7 *Ed. 4.* 10. *b.* 9 *Ed. 4.* 50.

[48.] *Dy.* 46. *b.* 3 *H. 6.* 31. *b.* *Th. D. l.* 6. *c.* 15. *f.* 1.

Nor chamberer, butler, &c. 5 *Ed. 4.* 32, 33. *Th. D. l.* 6. *c.* 15. *f.* 10.

But litterman is. 21 *Ed. 4.* 77. *b.* *Th. D. l.* 6. *c.* 15. *f.* 11.

Chancellor, treasurer, chamberlain, &c.

Sheriff, coroner, escheator, bailiff, &c.

Nor the addition of an unlawful employment; as, maintainer, vagabond, &c. 22 *Ed. 4.* 1. 2 *R.* 3. 2. 9 *H. 6.* 65. *Th. D. l.* 6. *c.* 15. *f.* 3.

Bankrupt, extortioner, usurer, &c. 22 *Ed. 4.* 1.

Dicer, bowler, carder, &c.

Nor the addition of a general occupation; as, farmer. 28 *H. 6.* 4. *Th. D. l.* 6. *c.* 15. *f.* 9.

If a man may be sued by several additions, he ought to have the most worthy; as, a gentleman, though he be a husbandman, shall be sued by the addition of gentleman. 14 *H. 6.* 15. *Th. D. l.* 6. *c.* 15. *f.* 5.

[A trader may be sued by his degree, or by his trade; and if by his degree, the writ shall not abate unless he shews, he has a higher degree. *Horsepool v. Harrison*, T. 9 *G. Str.* 556. *Smith v. Mason*, M. 2 *G. 2. Str.* 816. *Raym.* 1514.]

A viscount shall be sued by that name, and not by the name of lord. *Dal.* 42.

And therefore, if a gentleman be sued by the inferior addition, he may say, that he is a gentleman, and demand judgment of the writ, without saying, and not an husbandman; 14 *H. 6.* 15. but it was resolved, that he ought to traverse, that he was of an inferior trade. *Cro. El.* 884.

Yet if a man has a more worthy addition, by his office, or by a degree in the university, he may be sued by the one or the other; as, a master of arts, or doctor of divinity may be sued by the name of clerk. 35 *H. 6.* 55. *Th. D. l.* 6. *c.* 15. *f.* 13.

So

So a serjeant of the king's kitchen may be sued by the addition of cook, or gentleman, or esquire. *14 H. 6. 15. Th. D. l. 6. c. 15. f. 6.*

So a man may be sued by the addition of his degree or mystery; as, horner, packer, &c. or of yeoman. *2 Mod. Ca. 51. 2.*

So a gentlewoman may be sued by the name of spinster. *Semb. Dy. 88. b.*

And if a false addition be pleaded, the defendant ought in his plea to say, by what other addition of the same nature he ought to be sued; as, if a tradesman be sued by the addition of yeoman, it is no plea to say, that he is a horner, or of any other mystery, unless he be a gentleman, or of other degree superior to a yeoman. *R. 2 Mod. Ca. 51, 2.*

The addition shall be the same as it was the day of the writ purchased, and not with a *nuper*; as, *nuper episcopus*, &c. *21 H. 6. 3. b. 9 Ed. 4. 2. b. Lut. 40. Th. D. l. 6. c. 15. f. 8.*

And therefore, a plea for default of an addition will be bad, if it do not say, that he was a knight, &c. *tempore brevis*, or before. *R. 1 Sal. 6.*

And therefore, if a defendant, named gentleman, plead that he was a merchant, *tempore brevis*, and not a gentleman, it is no estoppel to say, that he bound himself by the name of gentleman; for perhaps he was a gentleman by an office, which is now determined; but if he was not so at the time of the writ, the writ by the *stat. 1 H. 5.* is not good. *R. 28 H. 6. 2. b.*

In an indictment, &c. there is no necessity for the addition of a dignity created since the statute *1 H. 5.* as, if a man be *miles et baronettus*, it is sufficient, if he is named *miles* only. *R. Lat. 169.*

(G.) Plea to the Count.

(G. 1.) For Insufficiency in it.

(G. 1.)
As a bad
demand.

THE first act, after the appearance of the parties, and the admittance of the jurisdiction, and the abilities of both parties is, that the party suing counts: and afterwards the party impleaded may demand *oyer* of the writ: and then, if there be any fault or insufficiency of the count, for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the party impleaded ought to shew it, and plead. *Th. D. l. 10. c. 1. f. 5. Fitz. Count 27.*

As, it may be pleaded in abatement, that the lands, tenements, or other things are not demanded by their proper names, or in the proper order in which they ought.

By what names and in what order lands, tenements, or other things ought to be demanded, *vide fine* (E. 2, &c.) *Pleader* (3 A. 4.)

(G. 2.)
Bispetitam. So, that the same thing is twice demanded; as, if the demand be of a manor, and rent, when the rent is parcel of the manor. *Th. D. l. 8. c. 25. f. 1. 40 Ed. 3. 25. a.*

Or, of a manor, and land that is parcel of the manor. *39 Ed. 3. 13. [10. b.] Lut. 851, 860. 1 Sho. 24. Th. D. l. 8. c. 25. f. 4.*

Or, of a manor, and an advowson which is appendant to the same manor. *6 Ed. 3. 267. Th. D. l. 8. c. 25. f. 3.*

Or, of land, and rent which is issuing out of the same land. *Th. D. l. 8. c. 25. f. 2. 10.*

Or,

Or, of a feignory, and a castle, when the castle is part of the feignory. 7 H. 6. 39. [36, 37.] *Tb. D. l. 8. c. 25. f. 6.*

This is a good plea in all *precipes quod reddat*. 40 Ed. 3. 25. a.

In a *formedon*. 3 Ed. 4. 28.

In an assise. 3 Ed. 4. 28.

Yet it is no plea in trespass for entering an house and breaking a close, that the close, and house, are the same place. 22 H. 6. 8. [7.] *Tb. D. l. 8. c. 25. f. 7.*

Nor in an action upon the *stat. R. 2.* for entering an house and two shops, that the shops are parcel of the house. 3 Ed. 4. 28. 5 Ed. 4. 88. b. 16 Ed. 4. 10. for it is in nature of trespass.

Nor in a *precipe* of the manor of *B. cum pertin' et 20 acras terre cum pertin'*, though *cum pertin'* once would have been sufficient. 40 Ed. 3. 25. a.

And the defendant ought to distinguish, what lands are twice demanded, from the other lands demanded. *Lut.* 851, 860. 3 *Lew.* 67.

So it may be pleaded to the demand of a manor, that the tenements put in view are two houses, and two carnes, and not a manor. 6 Ed. 3. 242. *Tb. D. l. 8. c. 27. f. 9.* (G. 3.) Demand mistaken.

To a demand of four houses, that the tenements put in view are four tofts, and not houses. *Tb. D. l. 8. c. 27. f. 8.*

So it may be pleaded in abatement, that the plaint is of two several and distinct causes of action. *Reg. pl.* 282. (G. 4.) Distinct causes of action.

That the plaint is of two trespasses, depending upon two separate and distinct titles. *Reg. pl.* 283. *Vide Action* (G.)

That the assise, or other real action is of the seisin, or death of two ancestors. *Tb. D. l. 10. c. 14. f. 11.*

That an ejectment of ward and trespass are joined in one writ. *Tb. D. l. 10. c. 15. f. 1.*

So it may be pleaded, that the plaint is not in a proper action; as that the plaintiff declared in an action on the case, when he ought to have an account. *Reg. pl.* 283. (G. 5.) Cause of another action appearing.

That he brought an action upon the case, when he ought to have had a general trespass. *Tb. D. l. 10. c. 27. f. 3.*

But in an action upon the case for money received to his use, it is no plea in abatement, that he received it as bailiff. *R. 1 Sho.* 71.

So, that the count shews a demand before a cause of action. *Tb. D. l. 9. c. 5. f. 3, 4, 5.* (G. 6.) No cause of action incurred.

As, in a *scire facias* by an administrator, tested 12th Feb. the defendant upon oyer of the administration, which is dated the 26th March afterwards, may plead an abatement, that the action was sued before a cause of action. 2 *Lew.* 197. *Vide Action* (E.)

So, in an *assumpsit* upon a promise to pay within seven years, brought before the seven years expired. *Bend. pl.* 93.

In debt, before the day of payment incurred. *Hob.* 199.

In debt by an administrator 2d April, 16 Jac. and the administration is granted 11th May afterwards. *Hob.* 245.

A B A T E M E N T.

In a *quare impedit* upon a writ tested 9th *May*, and alledged the presentation and refusal 29th *May* afterwards. *Hob.* 198.

In debt upon an obligation before the day of payment by the condition. *Ass. Ent.* 7.

So in debt against an administrator, it may be pleaded in abatement, that the writ was tested before administration granted. *R. Lut.* 8.

So in debt against an executor, that the testator was alive at the time of the writ purchased. *R. Lut.* 14, 16.

In debt against an heir, that his ancestor was alive the day of the original purchased. *Lut.* 15.

(G. 7.)
Default of
legal form.

So, that the count does not pursue the legal form; as, in a *formedon*, &c. that no esplees are alledged. *Bro. Count* 7.

In prohibition, that it is not alledged, that the writ of prohibition was delivered to the defendant; though this is not traversable. *Bro. Count* 11.

Upon a plea to the count, there is no other judgment, but *quod quer' nil capiat per breve*; and therefore, a fault in the count abates the writ. *Bro. Count* 8, 12, 24, 60, 64, 74.

(G. 8.) For Variance between the Count and the Writ.

So it may be pleaded in abatement, that there is a variance between the count, and the writ. *Reg. pl.* 277, 278.

Vide in
Pleader.
(C. 14. 15.)
Vide variance between
the writ and
record, &c.
Post. (H. 7.
&c.)

Or, a variance between the count, and the plaintiff. *Reg. pl.* 282.

As, if the plaintiff or defendant be named by one name in the count, and by another in the writ. *Ass. Ent.* 4. *Reg. pl.* 277.

If the count be of a trespass, by the master, brethren and others, and the writ by the brethren and others, omitting the master. 1 *Ed.* 3. 24. [23.] *Th. D. l. 9. c. 5. f.* 11.

If the writ be for a trespass in taking two horses, and the count of two cows. 6 *Ed.* 3. 249. *Th. D. l. 9. c. 5. f.* 13.

If the writ be for an assault in *homines et servientes suos*, and the count is only upon one man. *R. Bend. pl.* 217.

If the writ by parceners be, that the ancestor was grandfather to the one, and cousin to the other, the count that he was grandfather to the one, and great grandfather to the other. *Th. D. l. 9. c. 5. f.* 17.

If the writ be for waste in the land, and the count, for waste in cutting down trees. *Dal.* 72.

If the writ be by husband and wife in *jure uxoris*, and the count omit that. *Vide Ass. Ent.* 4.

If the writ be by an administrator generally, and the count by an administrator *durante minori etate*. *Lut.* 343.

If the writ be for a trespass committed at *Westminster*, and the count for a trespass in the king's palace. 2 *H.* 6. 7. b. *Th. D. l. 9. c. 5. f.* 33.

Or, for a trespass *contra pacem nuper regis*, and the count for a trespass *contra pacem regis nunc*. 8 *H.* 4. 21. b. 2 *Ed.* 4. 24. *Th. D. l. 9. c. 5. f.* 34.

Or, for a menace, for which he did not dare to go from *D.* to *A.* and the count for a menace, for which he did not dare to go to *B.* *Th. D. l. 9. c. 5. f.* 41.

If

If the writ be for a maihem, and the count for a battery.
Th. D. l. 9. c. 5. f. 44.

If the writ be *de bonis et catallis*, and the count of a regifter only. 7 *Ed. 4. 30.* [31.] *Th. D. l. 9. c. 5. f. 45.*

So, if the count be of a chest with charters; for they are not chattels. 22 *Ed. 4. 12.* *Th. D. l. 9. c. 5. f. 47.*

So, if the writ be *quare clausum fregit*, and the declaration *quare clausa fregit.* *Cro. El. 185.*

If a writ in *replevin* be *de averiis*, and the count *de equo.* *Cro. El. 330.*

So, if the count demands more than the writ; as, in an account, to account from *Michaelmas*, 3 *Ed. 3.* to *Mich. 5th Ed. 3.* when the writ was purchased fifteen days before *Michaelmas* 5th. *Th. D. l. 9. c. 5. f. 2.*

In an annuity, if the count demands more than was due at the time of the writ purchased. 5 *Ed. 3. 185.* 11 *H. 6. 68.* *Th. D. l. 9. c. 5. f. 4.*

If the count be of waste in three villis, and the writ of waste in two only. *R. Mo. 862. R. Hob. 38.*

Otherwise, if the count demands less than the writ. *Mo. 362.*

So, if the count shews, that there was no cause of action.

So, if a new assignment makes a material variance from the writ, the writ shall abate; for the new assignment is part of the declaration. 1 *And. 31.*

But a variance by way of explanation is not fatal; as, if the writ mentions *K.* without an addition, and the count mentions *K. magna.* 44 *Ed. 3. 1. b.* *Th. D. l. 9. c. 5. f. 7.*

So if the variance be in words, not in sense; as, if the writ be of two carucs of land, value 10*l. per ann.* and the count be of 10*l.* of land. *Brañ. 431.*

In waste, if the writ be by the plaintiff *ex assignatione A.* and the declaration be of a feoffment by *A.* saving the term to the defendant. 46 *Ed. 3. 25. b.* *Th. D. l. 9. c. 5. f. 9.*

In an account, if the writ be against him as *receptor denar.*, and the count say, that he received 100 florins. 6 *Ed. 3. 281.* *Th. D. l. 9. c. 5. f. 14.*

If the writ be *bona et catalla ad valentiam*, &c. and the count of live chattels *pretii.* 10 *H. 6. 23.* [22.] *Th. D. l. 9. c. 5. f. 37.*

If the writ be, that the defendant committed divers extortions and oppressions; the count, extortions and grievances. 31 *Ed. 3. 335.* *Th. D. l. 9. c. 7. f. 4.*

So if the variance be by particularizing in the count, that which is general in the writ: as, if the writ be in an account against one as bailiff of his manor, and the count demands an account of six beasts only. *Th. D. l. 9. c. 5. f. 10.*

[Or, as if the writ be to answer *A.* singly, and the declaration to answer *A. qui tam*, &c. *Canning v. Davis*, *P. 9 G. 3. 4 B. M. 2417. Lloyd v. Williams*, *M. 11 G. 3. 3 Wils. 141.*]

[But the converse, writ for *A. qui tam*, &c. and declaration by *A.* singly, is fatal. *Ibid.*]

In prohibition the writ was, that the suit in the spiritual court was, *de advocacione ecclesie*; and the count, that it was for the tithes,

tithes, obventions, and mortuaries of the church. 4 Ed. 3. 141. *Th. D. l. 9. c. 6. f. 12.*

In *formedon*, where the writ was, *que post mortem B.* to the demandant, as heir to *B. descendere debet*; and the count *que post mortem B.* to *H. ut filio et heredi*, and from *H.* to the demandant, &c. *Th. D. l. 9. c. 5. f. 16.*

In *detinue*, if the writ was of a charter; the count of a confirmation with warranty. *Th. D. l. 9. c. 5. f. 21.*

If the writ be for an amerciamment, and the count for several amerciamments for not coming to the lect. 2 H. 4. 15. b.

So, if the writ be *quod falsa sūda fabricavit*, and the count only of one deed. *Th. D. l. 9. c. 5. f. 36.*

Otherwise, if the writ be *diversa falsa facta*. *Semb. 35 H. 6. 37. b.*

If the writ be *bona et catalla*, and the count *de tribus tallis* of 10l. each. 21 H. 6. 32. [29, 30.] *Th. D. l. 9. c. 5. f. 38.*

Or, the count be of three hogsheads of wine, or ten quarters of corn, &c. *Th. D. l. 9. c. 7. f. 5.*

If a *quare impedit* be, *que ad nostram spectat donationem* generally, and the count *que spectat ratione prerogative*. R. Sal. 559.

So, if the variance proceeds from the form in the register; as, in a *formedon*, if the writ supposes, that the donor was cousin, and the count, that he was great great grandfather, to the demandant; for after great grandfather, there is no other form than cousin. *Th. D. l. 9. c. 5. f. 28.*

So, upon a writ in debt, a count in *detinue* or annuity is good. *Th. D. l. 9. c. 5. f. 19, 29.* * This conclusion does not seem to be very accurately deduced from the authorities referred to; in the first case, § 19. The writ and count were both in *detinue*, but the writ was for *detinue* of a writing obligatory and the count for *detinue* of a deed of annuity: in the second case, § 29. the writ was in debt generally, and the count, for part for goods sold, &c. and the remainder for money bailed to the defendant to bail over. *

But, upon a writ in *detinue*, a count in *trover* is not good. *Th. D. l. 9. c. 5. f. 30.*

(H.) Plea to the Writ.

(H. 1.) For an apparent Fault in it.

(H. 1.)
Rasure, or
interlinea-
tion.

NO plea to the writ can be before *oyer*. *Th. D. l. 10. c. 2. f. 1.*

But after *oyer* the defendant may plead in abatement, that the writ is insufficient, if any defect appears in the words, form, or substance of it. *Th. D. l. 10. c. 2.*

As if there was a suspicious rasure, or an interlineation seems to be made without lawful authority in a material place, which alters a matter of fact. *Vide Brañ. 188, 413. Britt. c. 48. Th. D. l. 10. c. 3. f. 2.*

As, in a *scire facias* where the name of baptism was rased. 45 Ed. 3. 18. b. *Th. D. l. 10. c. 3. f. 5.*

But by the *stat. 8 H. 6. 12.* no judgment shall be reversed for any suspicious rasure, or interlineation.

So the writ shall abate for false Latin; as, if the singular (H. 2.) number be for the plural, or *è contra*: as, *debet et solet*, for, *debent* False Latin, *et solent.* *Th. D. l. 10. c. 4. f. 1.* Cont. since the *stat. 8 H. 6.*

12. *R. 2 Saund. 39.*

Sit, for, *sint.* 10 *Ed. 3. 482.* *Th. D. l. 10. c. 4. f. 5.*

Ei, for, *Eis.* 17 *Ed. 3. 17.*

So *Assumpserunt*, for, *assumpsit.* *Th. D. l. 10. c. 4. f. 1.*

Or if the nominative or other case be put instead of another case; as *uxori*, for, *uxor.* 3 *Ed. 3. 86.* *Th. D. l. 10. c. 4. f. 3.*

Scire facias ob quibusdam error, for, *ob quosdam.* 26 *Aff. pl. 59.* *Th. D. l. 10. c. 4. f. 9.*

Hec, or *hos breve*, for *hoc breve.* *Th. D. l. 10. c. 4. f. 18, 21.* 9 *H. 7. 16. b.*

Post mortem prædicti A. et. B. for, *prædictorum.* *Reg. pl. 292.*

Senioris, for, *senior.* 44 *Ed. 3. 18. b.* *Th. D. l. 10. c. 4. f. 19.*

Johanni, for *Johannem.* 2 *H. 4. 8.*

Quos, for, *quas.* *Aff. Ent. 5.*

Or, if no Latin word, or a false word be inserted: as, *ex insinuatione*, for, *ex insinuatione*, in a *scire facias.* 23 *Ed. 3. 22.* *Th. D. l. 10. c. 4. f. 7.*

Mumdare, for, *mundare.* 2 *H. 4. 8.* *Th. D. l. 10. c. 4. f. 16.*

Tertio die Augusti, for, *Augusti.* *Th. D. l. 10. c. 4. f. 13.* 10 *Ed. 3. 533.*

Ballium, or *Dns*, &c. without a dash, for, *ballivum* or, *dominus.* 4 *H. 6. 16. b.* *Th. D. l. 10. c. 4. f. 18.*

Imaginavit, for, *imaginatus est.* 11 *H. 6. 3. 17.* [2, 14.] *Th. D. l. 10. c. 4. f. 20.*

Averiar, for, *averior*. *Sal. 701.*

So by the common law, any false or incongruous Latin abates an original writ. 10 *Co. 133. a.*

Though the suit be by the king; as, in a *quare impedit* by the king, *præcipite*, for, *præcipe.* 29 *Ed. 3. 57.* [44.] *Th. D. l. 10. c. 4. f. 11.*

But if a *scire facias* to execute a fine, pursue the fine, though there be false Latin, it shall not abate. *Th. D. l. 10. c. 4. f. 4, 8.*

So in a *pone*, or *recordare*, false Latin does not prejudice; for they are sued only to remove the record. 3 *H. 6. 3, 26.*

Nor in prohibition. 40 *Aff. pl. 26.* 28 *Ed. 3. 97.* *Th. D. l. 10. c. 4. f. 10.*

Nor in a sheriff's return. 2 *H. 4. 14.* [8.] *Th. D. l. 10. c. 4. f. 16.*

So false Latin does not vitiate any judicial writ. 10 *Co. 133. a.*

Nor any pleading, count, or judgment. 10 *Co. 133. a.* 1 *Sal. 328.*

Nor

Nor a verdict. *R. 1 Sal. 328.*

Nor any grant, or deed, where the intention of the parties appears. *10 Co. 133. a. Vide in Obligation. (B. 3.)*

So, if it appear by the same writ to be only a mistake, it does not vitiate: as if, in a writ directed to the sheriffs of *London*, there are sometimes *habeas*, sometimes *habeatis*, it is not error. *R. 2 Cro. 576.*

So, if the *Latin* is capable of a good construction, it will not prejudice: as, in a *præcipe quod reddat terram in villa de P. W. and C.* it is good, though it does not say, (*villis*) for *villa* shall be referred to the vill of *P.* only. *30 Ed. 3. 3. [2.] Th. D. l. 10. c. 4. f. 12.*

So in a *præcipe quod reddat 30s. de reddit' quas clamat*, for (*quas*) shall be referred to *30 solidat'*, not to the rent. *Th. D. l. 10. c. 4. f. 2.*

So, if the declaration shew, that a writ issued out of chancery *recitando*, &c. *per quod præcepit*, without saying, *who*; for the king was mentioned before, and it shall be intended, that he commanded it. *Pas. 2 Ann. (Comyns's Rep. 133.)*

So now by the *stat. 8 H. 6. 12.* rasings, interlinings, addition, or diminution of words, letters, titles, or parcels of letters in any record, &c. shall not reverse a judgment. *Vide Amendment (D. 2.)*

Nor false *Latin* by the equity of that statute. *R. 2 Sand. 39.*

(H. 3.) Omission of words. So, if a necessary word, or thing be omitted in a writ: as, in a writ against husband and wife, if the name of the wife be omitted in the summons. *Th. D. l. 10. c. 6. f. 1. Reg. pl. 291.*

So, if the name of one of the tenants be omitted in this clause (*unde queritur.*) *Th. D. l. 10. c. 6. f. 3.*

So, if in a writ of appeal (*habeas*) be left out. *13 Aff. pl. 10.*

If (*et*) be omitted between the names of two villis. *39 Ed. 3. 25. [20.] Th. D. l. 13. c. 6. f. 7.*

In a *scire facias*, if (*ibi*) in the clause (*et habeas ibi summ'*) be omitted. *Th. D. l. 10. c. 6. f. 10.*

So, if (*nisi*) be omitted in the clause (*et nisi feceris, &c.*) *Th. D. l. 10. c. 6. f. 11.*

If (*tunc*) be omitted in the clause (*quod tunc fit ibi auditur.*) *Th. D. l. 10. c. 6. f. 16.*

If (*ipsius querentis*) be omitted in (*ingressus terras ipsius querentis.*) *37 H. 6. 35. [31.] Th. D. l. 10. c. 6. f. 19.*

If (*injuste*) be omitted in a *quare impedit*. *Reg. pl. 276. Aff. Ent. 6.*

If (*per*) be omitted. *Reg. pl. 291.*

If in dower (*quæ fuit uxor*) be omitted. *R. 2 Cro. 217.*

If in a *cui in vita* (*quæ clamat esse jus et hereditatem suam*) be omitted. *Aff. Ent. 6. Vide Th. D. l. 10. c. 6. f. 14.*

But if the word or clause omitted be not material, the omission does not prejudice: as, in a *quare impedit* by the queen, if the words (*unde queritur*) be omitted. *18 Ed. 3. 2. Th. D. l. 10. c. 5. f. 5.*

So in a *quare impedit* against a bishop *electum et confirmatum*, if (*et*) be left out. 18 *Ed.* 3. 29. *Th. D. l. 10. c. 6. f. 7.*

Or, in a *scire facias* by the king, if the clause (*et quia volumus quæ in curia, &c.*) be omitted. 18 *Ed.* 3. 12. *b.* 24 *Ed.* 3. 30. *Th. D. l. 10. c. 6. f. 6, 9.*

Or, in ejectment, the clause (*et bona et catalla quæ ad valent'.*) *Pl.* 199, 228. *Th. D. l. 10. c. 6. f. 17.*

So in a *formedon*, if in the descent to the demandant, (*ut consanguineo et heredi*) be omitted, when the demandant shews himself to be cousin and heir. *R. Hob.* 51.

So in waste in *domibus et hominibus*, if (*exilium*) be omitted. 2 *H. 6.* 11. *b.* *Vide Hob.* 52.

In trespass *de averiis carucæ captæ*, if (*è interim deliberari facias, &c.*) be omitted. *Th. D. l. 10. c. 6. f. 24.*

Or, if the omission be supplied by words tantamount: as, in a *formedon* in remainder if the demandant say, *quæ post mortem, &c.* to the demandant, *ut filio et heredi F. remanere debet*, without saying, *post mortem F.* for when the demandant is called his heir, that imports him to be dead. *Hob.* 51. *Th. D. l. 10. c. 6. f. 2, 20.*

Or, if the omission be pursuant to the usual form, though it be of a material word; as, if in waste the plaintiff in his writ shews a feoffment to *A.* to the use of himself and his heirs, omitting, that the feoffment was to *A.* and his heirs, as it ought to be. *R. Hob.* 84.

So, if a material word, or clause be added: as, in a writ *quod* (*H. 4.*) *reddat messuagium et acram terræ*, and it is afterwards said, *quod* Material *predict' messuag' terr' et prata remaneant, &c.* 44 *Ed.* 3. 14. addition, *Th. D. l. 10. c. 7. f. 10.*

If 7^o *die Aug.* be added to the *teste.* 24 *Ed.* 3. 33. *Th. D. l. 10. c. 7. f. 4.*

If in an action by an executor, (*in retardatione execution'*) be inserted when the goods never were in his possession. 25 *Ed.* 3. 83. *Th. D. l. 10. c. 7. f. 6.*

In debt, *quod reddat 20l. quas ei debet et injuste detinet*, if these words be added, (*et quas ad talem diem solvisse debuisset,*) they are bad, for that exceeds the form. 3 *H. 6.* 2. *Th. D. l. 10. c. 7. f. 13.*

If the writ has more in the name of the plaintiff than was in the specialty, the writ shall abate. *Th. D. l. 10. c. 7. f. 14.* 3 *H. 6.* 23. *b.*

Otherwise, if more is inserted in the name of the defendant, *Th. D. l. 10. c. 7. f. 14.* 3 *H. 6.* 23. *b.*

If a *scire facias* * on a recognizance * against a terre-tenant be, *quare de terris (et catallis, &c.)* 30 *Ed.* 3. 30. [23. *b.*] *Th. D. l. 10. c. 7. f. 17.*

* For the terre-tenant or purchaser is liable only in respect of the land purchased of the conusor since the time of the recognizance. *

If an heir on the part of his mother make himself heir to his father and his mother. 41 *Ed.* 3. 24. *b.* *Th. D. l. 10. c. 7. f. 18.*

Otherwise,

Otherwise, if the addition be immaterial and surplusage: as in a *formedon*, if the demandant sets forth his descent more at large than is necessary. 5 *Ed. 3.* 217. *Th. D. l. 10. c. 7. f. 1.*

So, if the death of any be supposed, when it was not necessary. *Th. D. l. 10. c. 7. f. 3, 9, 19.*

If any words are twice inserted, when once would have been sufficient. 17 *Ed. 3.* 13. *Th. D. l. 10. c. 7. f. 2.*

If an assise be of a freehold in *villa de Westm'*; for *villa* shall be rejected. 24 *Aff. pl. 2.* *Th. D. l. 10. c. 7. f. 8.*

In an action upon the case for not paying toll, *quare tolonium asportavit, et solvere recusavit, asportavit* shall be rejected; for the other words are sufficient. 7 *H. 4.* 44. *Th. D. l. 10. c. 7. f. 11.*

If an addition, or *alius dictus* be added to the name of the tenant, in a real action. *Th. D. l. 10. c. 7. f. 16.*

In maintenance, if the writ says, (*manutenuit et adhuc manutenet*) the words (*et adhuc manutenet*) shall be rejected. *Th. D. l. 10. c. 11. f. 24.*

In an *audita querela*, where it was recited, that upon a judgment the defendant, who is now plaintiff, *captus fuit virtute brevis nostri judicialis de capias ad satisfaciendum*, where the word (*judicialis*) is not in the register: for it is surplusage. *R. i Leo.* 73.

(H. 5.)
Want of
certainty.

So, if the writ has not sufficient certainty; as, if a *scire facias* after a recovery in a *quare impedit* recite the recovery before justices, &c. but does not say, before what justices, or in what place. 18 *Ed. 3.* 12. *b. Th. D. l. 10. c. 8. f. 1.*

If a trespass be alledged *simul cum aliis malefactoribus*, without saying, whom. 8 *H. 5.* 5. *Th. D. l. 10. c. 8. f. 7.*

If an action upon the case be for levying money of certain lands, without saying, what lands. 11 *H. 4.* 64. *b. Th. D. l. 10. c. 8. f. 6.*

If a *cui in vita* do not shew, of what gift. *Th. D. l. 10. c. 8. f. 20.*

If a *quare impedit* of a prebend do not shew of what saint the church is. *Th. D. l. 10. c. 8. f. 21.*

If in an action upon the case it be alledged, *quod cum colloquium habitum fuit de assurando castrum*, &c. *R. 4 Leo.* 55.

But generality in a writ does not hurt; for it shall be explained in the count: as, a writ of champerty for maintaining a plea, &c. is sufficient, without saying, whether the defendant maintained the demandant or tenant; for it shall be said in the count. 21 *Ed. 3.* 10. *b. Th. D. l. 10. c. 8. f. 2.*

So, a writ of disseisin for purchasing a false protection is sufficient, without shewing in what action it was. 20 *H. 6.* 19. [18.] *Th. D. l. 10. c. 8. f. 9.*

So, a writ of trespass for *divers* extortions. *Th. D. l. 10. c. 8. f. 10.*

So, a *formedon*, as cousin and heir, without saying, in what manner cousin. *Th. D. l. 10. c. 8. f. 11, 17.*

So

So a writ of forcible entry into *divers* lands, or in *liberum tenementum*, without saying, what. *Vide* 38 H. 6. 1. 37 H. 6. 35. [31.] *Th. D. l. 10. c. 8. f. 14, 15.*

So, a writ of partition between tenants in common, or jointenants. *R. Cro. El. 743, 759.*

So it is sufficient, if the writ be as certain and particular, as the record or specialty upon which it is founded: as, in covenant for not conveying all his lands in *A.* where the deed obliged him to convey all his lands there. 47 Ed. 3. 3. *Th. D. l. 10. c. 8. f. 4.*

In a conspiracy of indicting for ravishing *A.* her goods and chattels, without saying, what; where the indictment was so. 47 Ed. 3. 17. *Th. D. l. 10. c. 8. f. 5.*

So a convenient certainty is sufficient, though it be not a precise certainty to every intent: as, a *scire facias* after judgment is sufficient, though it does not shew, in what action the recovery was, nor whether by default, or verdict. *Th. D. l. 10. c. 8. f. 8.*

So a *scire facias* against an heir or terre-tenant, without shewing what lands he had, or where they lie. 30 H. 6. 5. *Th. D. l. 10. c. 8. f. 12.*

So a *scire facias* upon a recovery in annuity, without shewing, for how much time the annuity was in arrear. 27 H. 6. 2. *Th. D. l. 10. c. 8. f. 16.*

So a writ of right by *præcipe in capite*, if it be, *quæ tenet de nobis*, without shewing, by what services. *Th. D. l. 10. c. 8. f. 18.* 39 Ed. 3. 26. [20.]

So an action upon the case, which shews a retainer *pro quâdam summa*, without saying, what in certain. 11 H. 6. 69. *Th. D. l. 10. c. 8. f. 25.*

Or, a warranty of certain *faccos*, without saying, how many. 13 H. 4. 1. *Th. D. l. 10. c. 8. f. 26.*

So, if any repugnancy appear in the writ; as, in waste the writ was in *Latin* by *A.* the son of *B.* and afterwards supposed a lease by *D.* the father of *A.* 9 Ed. 3. 482. [42.] cy. *Th. D. l. 10. c. 11. f. 2.* (H. 6.) Repugnant

In a *cui in vita* for land which the demandant claims for life, upon a gift made to her first husband, and to her in special tail. 18 Ed. 3. 27. *Th. D. l. 10. c. 11. f. 3.*

If the writ makes the demandant heir to his father one time, and afterwards heir to his father and mother. 29 Ed. 3. 47. [36.] *Th. D. l. 10. c. 11. f. 6.*

If in an action upon the case, the writ say, *quod cum habeat cheminum ratione tenure, &c. defendens levavit murum per quem murum cheminum habere non potest.* 33 H. 6. 26. *Th. D. l. 10. c. 11. f. 26.* * This seems very strict doctrine; it is evident that *habeant cheminum* in the first part of the sentence means that he is entitled to a way, and that in the latter part, *habere non potest* means that he is not able to enjoy that right. *

A writ of covenant is, *præcipe A. fidejussori B. quod teneat convent' inter querentem et B.* and therefore repugnant. 38 Ed. 3. 12. *Th. D. l. 10. c. 11. f. 28.*

Trespass

Trespass *quare equum suum cepit et interfecit*, &c. abated for the repugnancy; for it is not *contra pacem*, if the defendant kills his own horse. 27 *Aff. pl.* 64. *Th. D. l. 10. c. 11. f. 30.*
 * It should have been *equum ejus*. *

But, if the repugnancy be only in words, not in sense, it is not material: as, where in waste, it is said, that the defendant holds for life by the assignment of *A.* of whom the defendant holds by the curtesy: for, it is all one in effect, though the defendant is supposed tenant for life, and by the curtesy. *Th. D. l. 10. c. 11. f. 7.*

An action upon the statute for a distress in the highway, concluded *contra legem et consuetudinem Anglia*; yet good, for by the statute it is made the law and custom of the realm. *Th. D. l. 10. c. 11. f. 8.*

So waste by husband and wife upon a lease by them, *ad exheredationem uxoris*, is good. *Th. D. l. 10. c. 11. f. 9.*

So, an assise of the office of porter to the archbishop of Canterbury is good; though shewn, that there was no archbishop then alive. *Th. D. l. 10. c. 11. f. 16.*

A *formedon* of the gift of *A.* of *B.* *et quæ post mortem prædicti A. B.* good. 39 *Ed. 3.* 35. [27.] *Th. D. l. 10. c. 11. f. 21.*

* For *prædicti* shews that it is the same person. *

(H. 7.)
 Variance
 between
 the writ
 and record,
 specialty,
 &c.

So if the writ has a variance between that and the record, or specialty, &c. upon which it is founded; as, in an attain upon a verdict in an assise by *J. S.* when the record of the assise is *J. of S.* 26 *Aff. pl.* 31. So, 3 *Aff. pl.* 17. *Vide Th. D. l. 9. c. 1. f. 2, 6.*

In an attain, the writ concluded, *quod sum' qui terram illam tenet*; when the record was of a messuage and land. 7 *Aff. pl.* 5. *Th. D. l. 9. c. 1. f. 4.*

If a *quare non admisi* be, *quod cum mandaverimus episcopo*; and the record is *quod mandav' episcopo electo et confirmato*. 22 *Ed. 3.* 13. *Th. D. l. 9. c. 1. f. 3.*

So, if there be any other variance between the writ, and the record upon which it is founded. *Th. D. l. 9. c. 1. per totum.*

[But *Waltham Abbey*, (with an *e*) in the writ of error, whereas in the record it is *Waltham Abby*, (without an *e*), shall not quash the writ. *Aleberry v. Walby*, *M. 6 G. Str.* 229.]

[If defendant be called esq. in the recognizance, and gent. in the record, it is no variance. *Williams v. Francis*, *T. 4 G. 2. C. B. Fort.* 354.]

[If *pro misis & custagiis* is inserted in an action on a judgment, and is not in the record, it is no variance; for these words are surplusage, and ought to be rejected. *Whitney v. Mulcaster*, *M. 5 G. 2. Fort.* 354.]

If judgment be against a woman, and the writ recites, *quas recuperavit versus eum*. *R. 2 Cro.* 576.

But, if the writ agrees with the record upon which it is founded, it is sufficient; though there be a variance between the record, and the original, &c. upon which such record was founded,
 for

for which that is reversible. 12 *Aff. pl. 2. Th. D. l. 9. c. 1. f. 5.*

So, if the first record was abridged, and the writ agrees with the record so abridged, it is sufficient. *Th. D. l. 9. c. 1. f. 7.*

So, if the writ has a variance between that and another writ, or judicial process, to which it has relation; as, if there be a variance between the second deliverance, and *replevin*. *Th. D. l. 9. c. 2. f. 4.* (H. 8.)
Between
the writ,
and another
writ.

So, if there be a variance between the writ, and the deed, or specialty upon which it is founded: as, in a *formedon*, if the writ supposes the gift to *H. S.* and the deed is to *H. N.* *Th. D. l. 9. c. 3. f. 3.* (H. 9.)
Between
the writ,
and special-
ty.

In waste, if the writ suppose, that the plaintiff has an estate in fee; and the deed shew him to have only an estate-tail. 41 *Ed. 3. 23. 42 Ed. 3. 19. Th. D. l. 9. c. 3. f. 10.*

So in a *formedon*, if the writ suppose a gift in tail to the demandant and his heirs; and the deed be to the demandant and his wife, and their heirs. *Th. D. l. 9. c. 3. f. 2.*

So in assise for rent by *A. B.* knight; and the deed is by *A. B.* only. *Th. D. l. 9. c. 3. f. 15.*

So in an annuity, if there be a variance between the writ, and specialty. *Th. D. l. 9. c. 3. f. 24.*

So in covenant. *Th. D. l. 9. c. 3. f. 64.*

So in an *audita querela*; as, if a statute be supposed to have been acknowledged before the clerk of the staple; and it was before the mayor and clerk. *Th. D. l. 9. c. 3. f. 67, &c.*

So in debt, if there be a variance between the writ, and the obligation. *Reg. pl. 278. 9. 281.*

As, if the writ be, *de octogint' libris*, and the obligation, *de octigent'*. *R. Hob. 19. Aff. Ent. 5.*

Or, if the writ varies from the obligation in the name of the plaintiff, or defendant. *Th. D. l. 9. c. 3. f. 33, 35, 36, 37, 40. Aff. Ent. 3, 4.*

But, if the variance be only in words, not in sense, it is not material; as, a *formedon* upon a gift to *A. et heridibus de corpore suo exeuntibus*, and the deed is, *procreandis*. *Th. D. l. 9. c. 3. f. 1, 6.*

An assise of his freehold, and the plaint was of estovers, and the deed was of estovers. 23 *Aff. pl. 1. Th. D. l. 9. c. 3. f. 18.*

Debt for thirty stone of wool, and the specialty is a sack of wool. *Th. D. l. 9. c. 3. f. 25.*

So, if the writ be to the effect of the deed. *Th. D. l. 9. c. 3. f. 14, 65.*

So, if the variance be in a place not material to the action; as, in a *formedon* in remainder, the writ was, a gift to *A.* and *T.* his wife, and to the heirs of the body of *A.* and if *A.* die without issue, to the demandant: the deed was, if *A.* and *T.* die without issue between them, &c. *Th. D. l. 9. c. 3. f. 4, 5, 7. 9.*

So in a *formedon* upon a gift in tail, remainder, &c. and the deed is of a gift in *frank-marriage*. 17 Ed. 3. 65. Th. D. l. 9. c. 3. f. 16.

So in a *formedon* the writ does not mention any condition; but the deed was upon a condition. 3 H. 7. 13. b. Th. D. l. 9. c. 3. f. 11.

Or, if the variance be in the addition, or description of the person. Th. D. l. 9. c. 3. f. 10, 13, 22, 23, 24, 26, 27, 29, *usque* 33, 38, 48, 59, 61.

Or, in the addition of price, or the like circumstances in the writ, which are omitted in the specialty. Th. D. l. 9. c. 3. f. 34, 66.

Or, if the writ be for 20*l.* and the specialty for 20*l.* 14*s.* 6*d.* if the plaintiff in his declaration acknowledges the payment of the residue. 4 H. 6. 26. b. Th. D. l. 9. c. 3. f. 47.

(H. 10.)
Between
the writ,
and a testa-
ment, &c.

So in debt by an executor, if there be a variance between the writ, and the testament, in the name of the testator. Reg. pl. 280. Th. D. l. 9. c. 4. f. 6.

Or, in the names of the executors. 43 Ed. 3. 34. b. 14 H. 6. 5. Th. D. l. 9. c. 4. f. 14.

And for a variance in the name of one executor, the whole writ abates. 3 H. 4. 1. Th. D. l. 9. c. 4. f. 10.

So, if there be a variance between the writ, and the letters of administration. Th. D. l. 9. c. 4. f. 15, 16. Aff. Ent. 4.

If the plaint be in his own right, and the declaration, as administrator. R. Skin. 386.

But, a variance in the description of persons is not material, if it appears that they are the same persons. Th. D. l. 9. c. 4. f. 1, 2, 7, 8.

And if an action be by executors upon a specialty, which varies from the testament, it is sufficient if the writ agree with the specialty. Th. D. l. 9. c. 4. f. 2, 4, 5.

(H. 11.)
Transposi-
tion of
words.

So, if a word or sentence in the writ be mis-placed contrary to the usual form; as, if in a *cui in vita*, the writ were, *In qua non habet ingressum nisi post dimissionem quam A. quondam vir, &c. inde fecit D. cui ipsa in vita sua, &c.* when it should have been, *quam A. quondam vir, &c. cui ipsa in vita sua, &c. inde fecit D. &c.* Th. D. l. 10. c. 12. f. 2.

So, if the name of the wife be put before the name of her husband. Reg. pl. 289. 2 Leo. 59. 3 H. 6. 33. b. Th. D. l. 10. c. 12. f. 5.

Cont. if it do not appear plainly, that they are husband and wife at the time. R. 2 Leo. 59.

If the addition of the word (*knight*) be put after a name of dignity; as, *Præcipe Edwardo D'no W. militi.* R. Mo. 22.

(H. 12.)
Defect of
the writ.

So, if the writ wants form: as, if the plaintiff does not shew a sufficient title to the thing demanded; as, if a man in a writ of entry

entry upon a *disseisin* to his ancestor, *clamat jus et hereditatem suam*. Th. D. l. 10. c. 14. f. 1. (a)

In a ravishment of ward, if the plaintiff does not shew in the writ, that he claims the ward as guardian, nor how. Th. D. l. 10. c. 14. f. 5.

If tenant in tail in a *quod ei deforceat* does not shew, of what gift in the writ. Vide 6 H. 4. 2. b. Th. D. l. 10. c. 14. f. 6.

So, a writ of entry, in nature of an assise, ought to shew a title in the plaintiff. 21 H. 6. 28. [26.] Th. D. l. 10. c. 14. f. 9.

So in a *formedon* the demandant ought to shew himself heir to the donee, or to him who is made heir to the donee before. Th. D. l. 10. c. 17. f. 3.

But it is not necessary, that the title should appear in the writ, when it is shewn in the count. Th. D. l. 10. c. 14. f. 2.

Nor, when the action is for punishment of a wrong. Th. D. l. 10. c. 14. f. 3.

As, an action upon the case, trespass, &c. 2 H. 5. 3. Th. D. l. 10. c. 14. f. 7.

Yet, if a writ shew a bad title, when none is necessary, it shall be abated. 12 H. 4. 7. Th. D. l. 10. c. 14. f. 16.

So, if there be no venue alledged; as, in trespass for a disturbance in his fair and market, if the plaintiff do not shew, in what place the disturbance was made. 2 Ed. 3. 42. Th. D. l. 10. c. 20. f. 2. (H. 13.) Want of venue.

So in an *assumpsit*, if the plaintiff do not alledge any place where the promise was made. 48 Ed. 3. 6. Th. D. l. 10. c. 20. f. 13.

So in a *scire facias* to execute a fine, if it be not shewn, in what place the land lies. Th. D. l. 10. c. 20. f. 25.

So in a *præcipe quod reddat ballivam custodiendi parcam de D*. Th. D. l. 10. c. 20. f. 24.

But if there be any venue named, to which the fact alledged may be coupled, it is sufficient: as, in covenant *quod teneat conventionem de terris pertinent' ad ecclesiam de B*. it is sufficient, without shewing in what place the lands lie; for the venue shall come from B. 4 Ed. 3. 144. Th. D. l. 10. c. 20. f. 5.

So, in an action upon the case, if the writ says, that the defendant at such a place, *ripam*, &c. *reparare debet, et pro defectu*, &c. so many acres of land were overflowed; it is sufficient, without shewing, in what place the land lies. Th. D. l. 10. c. 20. f. 9.

[In *scire facias* by husband and wife, on judgment obtained by wife whilst sole, it is not necessary to lay a venue where they

(a) This seems very inaccurately cited, for according to the writ in the Register and the rule in F. N. B. 201. F. every writ of entry on disseisin to the ancestor ought to have this clause, *quod clamat esse jus et hereditatem suam*, so that the want of it would seem to be the defect, for which the writ ought abate, rather than the insertion.

were

were married. *Blake v. Dodemead*, Tr. 13 G. Ld. Raym. 1504, Str. 775.]

(H. 14.)
Want of
teste.

So, if there is a want of *teste* in the writ, *Th. D. l. 10. c. 22. f. 4.* for without a *teste*, the writ is null. *R. 2 Jon. 83.*

Or, if it be dated *anno domini*. *Per Parning*, 8 Ed. 3. 433. *Th. D. l. 10. c. 22. f. 2.*

So, where the writ is dated *tertio die Augusti*. 10 Ed. 3. 533. *Th. D. l. 10. c. 22. f. 4.*

So, if the *teste* be *duodecimo regis*, for, *duodecima*. *R. 1 Lev. 2.* [Or, if mistaken in the year of the king. *Barnes* 409.]

Or, if it be written *este*, for, *teste*, leaving out the *t*. *R. Cro. El. 592.*

So, if a writ issuing out of the King's Bench or Common Pleas, be tested at a day out of term, it will be bad. *R. 1 Sid. 304. Acc. Lat. 11.*

So, if the *teste* of a subsequent process which ought to be continued, be not upon the day when the former was returnable. *Sal. 699.*

So judicial process having a *teste* out of term will be void. *Sal. 700. [Barnes 407.]*

But a *teste* may be the last day of the term, though no cause for process at that time; as, in a *diem clausit extremum*, though the party was then alive. *R. Hard. 126.*

So original process out of chancery may be tested out of term. *Lat. 11.*

[If the *teste* is right, it is immaterial that the date is wrong, for it is no part of the writ. *Coleby v. Norris*, P. 18 G. 2. *Wilf. 91.*]

A fault in a *teste* shall not be amended; for it is not form. *1 Sho. 80.*

Or, if there are not fifteen days between the *teste* and return. *R. 1 Sho. 80.*

(H. 15.)
Bad return.

So, if the return be defective; as, if there are not fifteen days between the *teste* and return. *Ass. Ent. 6. 1 Sal. 63. Vide Process (B.)*

As between the *teste*, and return of a *scire facias*. *Lut. 25.*

Of a *distingas* against throwers down of fences. *R. Sho. 80.*

[If there are not fifteen days between *teste* and return of *capias ad respondendum*, the court will set it aside on motion. *Atkinson v. Taylor*, 2 *Wilf. 117.*]

But by the *stat. 16 Car. 1. c. 6. f. 8.* All writs in personal actions returnable from *tres Mich.* till *crast. Animar.* shall be good, though there be not fifteen days between the *quarto die* of *tres Mich.* and the *essoign* day of *crast. Animar.* *Lut. 26.*

Or, if the return is not good in respect of form; as, in debt, &c. if the return be, *nichil quod summoniri possint*, omitting *per quod*. *R. Cro. El. 50.*

So in debt against two, if the return be, *nichil habent, &c. per quod summoniri possint*, omitting, *nec eorum aliquis*. *C. Cro. El. 50.*

[So

[So if the writ were never returned ; (of this there must be affidavit.) *Sherman v. Alvarez. M. 12 G. 1. Str. 639. 2 L. Raym. 1409.*]

So, if the return be at a day after the term. *R. Cro. El. 605.*

But where the return day is upon *Sunday*, if the writ be returned *die Lunæ post vx. Trin.* it will be as well in *B. R.* as if it had been in *xv. Trin.* *R. Sho. 60.*

So in *B. R.* if the proceeding be by bill or by plaint, as in an assise, or by information exhibited, there the process ought regularly to be at a day certain, viz. *Die Lunæ post xv. Trin.* *Per Holt, Mod. Ca. 268.*

So it may be in *C. B.* in an assise, or suit by bill. *Mod. Ca. 268.*

Tho' the process in *B. R.* requires an appearance, or is returnable in another county. *Mod. Ca. 268.*

But in *C. B.* the process generally ought to be returnable at a common day, viz. *xv. Trin. &c. Mod. Ca. 268.*

So in *B. R.* where the indictment, or information is removed thither by *certiorari.* *Mod. Ca. 268.*

When a fault in the return shall be amended. *Vide in Amendment, (G. 1, 2.)*

So, if the conclusion be bad ; as, if an executor brings a *quare* (H. 16.) *impedit* upon a disturbance in the life-time of the testator, and concludes in *retardationem executionis testamenti.* *Lut. 3.* Bad conclusion.

If a *scire facias* upon a recognizance concludes *juxta formam recuperationis prædictæ.* *R. Lut. 26.*

(H. 17.) For Matter *debors*, that shews a Falsity, or other Defect in the Writ.

So it may be pleaded to the writ in abatement, that the land demanded lies in another county. (H. 17.)

Or, that parcel lies in another county. 26 Ed. 3. 68. [14.] That the land lies in another county.

Tb. D. l. 11. c. 8. f. 1. 3. And this plea goes to the whole writ. *Per Wilby, 26 Ed. 3. 68. [14.] Tb. D. l. 11. c. 8. f. 3.*

So by the *stat. 6 R. 2. 2.* If by the declaration it appears, the contract was made in another county than where the action was brought, the writ shall abate. *Vide Action (N. 6.)*

In what county actions ought to be brought. *Vide Action (N. 1, &c.)*

So it may be pleaded, that there is not any such vill or hamlet (H. 18.) in the said county, as that in which the land is supposed. *Tb. D. l. 11. c. 11. Ast. Ent. 2. Co. Ent. 121. b.* No such vill.

That there is a parish of *St. James within the liberty of Westminster* ; but no parish of *St. James Westminster* only. *R. 1 Sal. 59.*

So,

(H. 19.) So, if land be supposed in *Dale*, it may be pleaded, that there are two *Dales*, and none without an addition. *Th. D. l. 11. c. 12. f. 14. Aff. Ent. 3.*
 and none without an addition.

So, that there is *Dale juxta A.* and *Dale juxta B.* tho' the vill have not any addition. *Th. D. l. 11. c. 12. f. 4.*

So, if the demand be of the manor of *D.* that there are two manors, and none without an addition. *Th. D. l. 11. c. 12. f. 5.*

So in a *quare impedit* for the church of *D.* that there are in *D.* two churches, one of *St. Peter*, the other of *St. M.* *Th. D. l. 11. c. 12. f. 7, 9.*

So in a *præcipe quod reddat* against the prior of *W.* that there are in *W.* the prior of the *Freres Prechors*, and the prior of *Notre Dame.* *Th. D. l. 11. c. 12. f. 10.*

So in *quare impedit* for a prebend in *ecclesia de S.* that in *S.* there are two collegiate churches. *40 Ed. 3. 17. Th. D. l. 11. c. 12. f. 13.*

So in debt upon an obligation, though the obligor be named of *Dale* simply. *1 Rol. 863. l. 5.*

But two *Dales*, and none without an addition, is no plea in an assise; for the recovery shall be by the view of the jurors. *Th. D. l. 11. c. 12. f. 11, 12.*

Nor in waste. *9 H. 6. 42. b. Th. D. l. 11. c. 12. f. 17.*
 * For the same reason.*

Nor in account. *Th. D. l. 12. c. 12. f. 14.* *By the latest authority quoted in *Th. D. l. 11. c. 12. f. 14.* the plea is good in account.*

Nor in trespass. *Th. D. l. 11. c. 12. f. 19.*

And if two *Dales*, &c. be pleaded, it is a good replication that what the tenant calls vill, are places in *D.* But the issue shall be, whether there be a *Dale* without an addition. *18 Ed. 3. 24. b. Th. D. l. 11. c. 12. f. 6.*

But it is not a good replication to say, that there is a vill called *Dale*, without saying, that there is a *Dale* without an addition, *3 H. 6. 8. b. Th. D. l. 11. c. 12. f. 15.*

(H. 20.) So, if land is supposed in two vill, it may be pleaded, that nothing lies in one vill: as, in an assise. *Th. D. l. 11. c. 13. f. 4.*
 Nothing in one vill.

So in *cofnage*. *6 Ed. 3. 274. [32.] Th. D. l. 11. c. 13. f. 1.*

Otherwise in dower. *Th. D. l. 11. c. 13. f. 2.*

Or, in a writ of entry upon the statute of *Rich. 2.* *4 Ed. 4. 33. [31.] Th. D. l. 11. c. 13. f. 4.*

Upon this plea the whole writ abates. *Th. D. l. 11. c. 13. f. 4.*

(H. 21.) So it may be pleaded, that the land lies in another vill not The whole, named. *2 Ed. 3. 31. Th. D. l. 11. c. 14. f. 2.*

or part in a vill not named. So, that parcel of the manor demanded lies in another vill not named. *Th. D. l. 11. c. 14. f. 3.*

So in admeasurement of pasture of tenements in *C.* it may be pleaded, that he has lands in *B.* and *D.* to which he has common appendant in the same pasture. *Th. D. l. 11. c. 14. f. 1.*

So

So in waste in land and wood in *A.* that the wood lies in another vill not named. 8 *Ed.* 3. 402. [34.] 436. *Th. D. l. 11. c. 14. f. 2.*

In a *cui in vita.* *Th. D. l. 11. c. 14. f. 4.*

In an assise for rent, that parcel of the land out of which, &c. lies in another vill. 5 *Ed.* 4. 80. *Th. D. l. 11. c. 14. f. 15.*

In replevin. *Th. D. l. 11. c. 14. f. 14.*

But this is no plea in an ejectment of ward, that parcel lies in another vill; for he ought to answer to the ejectment. *Th. D. l. 11. c. 14. f. 6.* 14 *H.* 4. 17. [16.]

Nor in dower. *Dub. Th. D. l. 11. c. 14. f. 9.*

Nor in an action upon the case for stopping a sewer, that part of the sewer is in another vill. 12 *H.* 4. 3. *Th. D. l. 11. c. 14. f. 13.*

So in trespass, it is no plea, that the whole lies in another vill. *Th. D. l. 11. c. 14. f. 11, 14.*

So, if land is supposed in *B.* it may be pleaded, that the vill is named *D.* *Th. D. l. 11. c. 19. f. 1, 5.* (H. 22.)

So, if land is supposed in the vill of *B.* it may be pleaded, that *B.* is not a vill, but a hamlet. *Th. D. l. 11. c. 19. f. 6.* Misnomer of a vill.

Or, that *A.* is a vill; and *B.* within *A.* 43 *Ed.* 3. 5, 30. for though an action may be maintained in a vill or hamlet, or in a place known out of a vill or hamlet, yet it cannot in a place within a vill, or a hamlet. *Th. D. l. 11. c. 17. f. 2.*

But the plaintiff may reply, that the vill is known by the one name and the other. *Th. D. l. 11. c. 19. f. 15.*

So in a *quare impedit ad ecclesiam de A.* it may be pleaded, that what the plaintiff calls a church, is a chapel annexed to the church. *Th. D. l. 11. c. 20.* (H. 23.) Misnomer of a church, &c.

Or, no such church in that county. 45 *Ed.* 3. 6. *Th. D. l. 11. c. 20. f. 3.*

Or, that the church supposed collegiate, is not so, but parochial. *Th. D. l. 11. c. 20. f. 4.*

But if the church of *St. Martin* in *B.* and the church of *St. Peter* in *B.* are united, there shall be a *quare impedit* for the church of *B.* without saying, *St. Martin*, or *St. Peter*; for there is no other church there now but the church of *B.* *R. Dy.* 259. b.

So it may be pleaded in replevin, that the taking was in another place. *Th. D. l. 11. c. 21.*

So it may be pleaded to the writ, that there is another action depending for the same cause; as, in *trover* in the exchequer for a certain quantity of cotton, it may be pleaded, that there is another action upon the case depending in *B. R.* for *trover* and conversion of the same goods. *R.* 5 *Co.* 61, *Sparry.* (H. 24.) Another action for the same cause.

So in an *assumpsit* for fees, another action pending in *B. R.* for the same cause. *Lev. Ent.* 25. *Lut.* 33.

So in debt upon a bond, another action pending in the same court upon the same bond. *Lev. Ent.* 54.

So in a *quare impedit*, another *quare impedit* pending for the same avoidance. *Hob.* 137.

So in an assise of *darrein presentment*, it may be pleaded, that a *quare impedit* is depending against the defendants for the same avoidance. *R. Hob.* 184. *Mo.* 883. *Hutt.* 3.

So in *dower*, that another writ of dower is depending against him for the same tenements. *Tb. D. l. 11. c. 39. f. 2, 11.*

In *replevin*, that trespass is depending for the same taking. *Vide Tb. D. l. 11. c. 39. f. 32.*

In trespass, that an appeal of maihem is depending for the same battery. *Tb. D. l. 11. c. 39. f. 36.*

That a *replevin*, or *detinue* is depending for the same goods. *14 H. 7. 12. b.*

[But now replevin depending below, cannot be pleaded to trespass for taking cattle. *White v. Willis, P. 32 G. 2. 2 Wilf. 87.*] (a)

In trespass for a horse, or thing certain, that another trespass for the same thing is depending. *Vide 5 Co. 61. b.*

So to an information, it may be pleaded that another information is depending for the same cause. *Adm. Hob.* 128.

And, if two informations are exhibited the same day for the same cause, the pendency of the other may be pleaded reciprocally, to the one and the other; for there being no precedency in the suit for either, judgment shall be given for neither. *Per Cur. Hob.* 128. And *Mo.* 864, 5. says, that he shall answer neither of them.

So, if there are two *replevins* by two persons for the same taking, the defendant shall answer neither of them. *R. Mo.* 864, 5.

So it may be pleaded, that another action is depending for the same cause, though several defendants are added: as, in a *quare impedit*, the defendants may plead another *quare impedit* pending for the same presentment against any of them. *R. Hob.* 137.

But in trespass against three defendants, it is no plea, that there is another action pending against two of them. *R. Lut.* 42. *Dub.* 1 *Sho.* 75. *Cont. per three J. Holt. dub. Carth.* 96.

Nor in debt upon an obligation by two, that the obligation was to three, who have an action depending; for it cannot be the same obligation. *Cro. El.* 202.

So it may be pleaded, that there is another *quare impedit* depending against the defendants for the same presentment, though it be for another disturbance. *R. Hob.* 137. 1 *Brownl.* 163.

So, a plea of another action depending for the same cause in another court of *Westminster* is good, as well as if it were depending in the same court. *R. 5 Co. 62. a.*

But in a real or personal writ where no certainty is contained, it is no plea, that there is another action for the same cause, until a plaint or declaration made upon record, which reduces the

(a) The general rule is that an action pending in an inferior court cannot be pleaded to another action for the same thing in a superior court.

generality of the writ to a certainty, *unde constare potest* to the court to be the same cause: as, in assise *de libero tenemento* until the plea, which shews of what tenements he complains, it is no plea, that the plaintiff had another assise depending of the same tenements. 5 Co. 61. b. *Sparry Th. D. l. 11. c. 39. f. 14.*

So, in *rescous*, when the plaintiff has declared upon record, it is a plea, that another writ is depending for the same cause; otherwise not. 5 Co. 61. b.

So, in trespass. 5 Co. 61. b. *Th. D. l. 11. c. 39. f. 53.*

So, in forgery of false deeds. 5 Co. 61. b.

In *detinue*. 39 H. 6. 13. [12.] 29. [27.] *Th. D. l. 11. c. 39. f. 54.*

In a writ of entry in nature of an assise, that he had trespass returnable at the same day. *R. Dal. 4.*

So it is no plea that another action depends for the same cause against a stranger. *Vide Hob. 137, 8.*

As, that another writ depends against others as executors of the same testator. 3 H. 6. 14. *Th. D. l. 11. c. 39. f. 46.*

Another *quare impedit* against others for the same avoidance; for the plaintiff may have several *quare impedit*s against each defendant. 1 *Brownl. 161.*

And it is no plea to a writ in *C. B.* or other court of *Westminster*, that there is another suit pending for the same cause in an inferior court; as in *London, Norwich, &c.* *R. 5 Co. 62. a. Th. D. l. 11. c. 39. f. 40, 47.*

Nor, that there is an information depending for the same cause. *Semb. Bro. R. 438.*

Nor, that there is a suit in the admiralty for the same cause. *R. F. g. 313, 4.*

So it is no plea against the king, that another action is depending for the same cause; but the first action shall be discharged. *Th. D. l. 11. c. 39. f. 19.*

So, if a writ of a higher nature be purchased, pending an action of an inferior nature for the same land, the second writ shall not abate, but the first. 8 H. 6. 38. [37.] 9 H. 6. 51. 22 H. 6. 40. *Th. D. l. 11. c. 39. f. 50.*

If a man pleads another action depending of the same term, he ought to shew, that this action was filed upon such a day, and that the other action was filed before, *viz.* such a day in the same term; otherwise it will not avail. *R. 2 Lev. 141.*

So it may be pleaded to the writ, if the demandant or plaintiff has mistaken his title: as, in a *nuper obiit* of the seisin of the father, it may be pleaded, that their brother entered after the death of the father, and died seised. *Th. D. l. 11. c. 40. f. 1.* (H. 25.) Mistake of the title. As, darrein seisin.

So in *cofinage*, the seisin of one of his ancestors after the death of the cousin, of whose seisin, &c. is a good plea. 3 *Ed. 3. 97. Fitz Coffinage 2, 9. Th. D. l. 11. c. 40. f. 4.*

So in *Mort d'ancestor*, that the demandant himself was seised after the death of his ancestor. 5 *Ed. 3. 179. 11 Aff. pl. 17. Th. D. l. 11. c. 40. f. 7.*

So in a writ of entry. 33 H. 6. 7. *Th. D. l. 11. c. 40. f. 15.*

In a writ of escheat. 11 H. 4. 10. b. *Th. D. l. 11. c. 40. f. 14.*

And *darrein seisin*, alledged without title, goes to the writ. 5 *Aff. pl. 1.*

But, alledged with title goes to the action. 5 *Aff. pl. 1. Th. D. l. 11. c. 40. f. 7.*

Darrein seisin is no plea in a writ of right. 5 *Aff. pl. 1. 11 H. 7. 3. b. Th. D. l. 11. c. 40. f. 7, 18.*

(H. 26.)
Darrein
present-
ment, and
plenarty.

So in a *quare impedit* of the presentment of such a one, a *darrein presentment* by another ancestor of the tenant, or by himself, may be pleaded to the writ. *Th. D. l. 11. c. 41. f. 1, 3.*

And such *darrein presentment* by the tenant or his ancestor goes to the writ without title. 8 *Ed. 3. 426. Th. D. l. 11. c. 41. f. 3.*

And, if alledged with title, it may be pleaded to the writ, or to the action. 8 *Ed. 3. 426. Th. D. l. 11. c. 41. f. 3, 18. 24 Ed. 3. 1.*

And *darrein presentment* is a plea, though it was by the vendor himself upon his vendee. *Th. D. l. 11. c. 41. f. 8.*

So to a *quare impedit*, or *darrein presentment*, plenarty of the presentment of the defendant may be pleaded in abatement, without shewing title to the patronage. *Th. D. l. 11. c. 42. f. 4, 6.* But by the *stat. W. 2. c. 5.* it must be a plenarty by six months.

Or, plenarty of the presentment of the plaintiff himself, or his ancestor. *Th. D. l. 11. c. 42. f. 6. 20.* And there is no necessity to say, that the presentee of the plaintiff was instituted and inducted six months before the writ purchased. *f. 20.*

But *darrein presentment*, or plenarty, cannot be alledged against the king. 9 *Ed. 3. 465. Th. D. l. 11. c. 42. f. 7. 11, 17.*

So, *darrein presentment* in time of war, is no plea. *Vide Th. D. l. 11. c. 41. f. 2.*

Nor, a presentment after the avoidance upon which the *quare impedit* is founded. *Th. D. l. 11. c. 41. f. 9.*

And by the *stat. W. 2. 13 Ed. 1. c. 5.* Presentment without right, during the minority of the heir, or during an estate by curtesy, or in dower, or of tenant for life, years, or in tail, shall not prevent the heir, when of full age, or after such estate determined, to have such writ of possession at the next avoidance, (*viz. darrein presentment*, or *quare impedit*) as his ancestor, upon the last avoidance before his death or such estate made, might have had. And this remedy shall extend to wives inheritrices upon presentments during their coverture, and to persons spiritual, in case any such presentment shall be made, during the vacancy of their spiritualties.

But if a wife purchase an advowson, and any one presents during her coverture, this *darrein presentment* may be pleaded to her writ of *quare impedit*, or *darrein presentment* since this statute. *Th. D. l. 11. c. 41. f. 6.*

So, if the presentment be during the infancy of an heir, who afterwards aliens the advowson, this *darrein presentment* may be pleaded

pleaded to an action by the alienee, who shall not avoid it by force of the statute. *Th. D. l. 11. c. 41. f. 12.*

So, if a wife has an advowson only for life, presentment during her coverture is a plea since this statute; for the wife had not an inheritance. *Th. D. l. 11. c. 41. f. 12.*

When usurpation puts the rightful patron out of possession, *Vide in Esq. life (H. 14, 15.)*

When plenary shall be pleaded, and how. *Vide in Pleader (3 J. 8.)*

So it may be pleaded in a *formedon in descender*, that the donee (H. 27.) had a son who survived his father, and was seised by force of the intail, who is not named. *R. Cro. El. 842. Th. D. l. 11. c. 50. f. 1, 12. 8 Co. 88. b.* Mistake of the descent.

So, in a *formedon in reverter*, or *remainder*, that in the pedigree of the donor, or of him in remainder, there is an omission of the eldest son, who survived his father. *8 Co. 88. a.*

Otherwise, in the pedigree on the part of the donee; for the demandant is a stranger to that. *8 Co. 88. a.*

So it may be pleaded, that another was later seised after him, to whom the demandant makes himself heir. *Th. D. l. 11. c. 51. 8 Co. 88. b.*

So, in an appeal it may be pleaded, that there was another heir nearer in whom the right to appeal attached though he be then dead. *Han. Ent. 259. H. P. C. 182.*

So, in a *formedon in descender*, it may be pleaded in abatement, that the demandant does not shew how he is cousin and heir. *Co. Ent. 320. a.*

But in a writ of error as cousin and heir, the plaintiff need not shew *how* cousin. *R. 2 Cro. 160.*

So the omission of the eldest son in the descent, who did survive his father, is not material. *Th. D. l. 11. c. 50. f. 2. Vide 8 Co. 88. b.*

Nor the omission of the elder son or brother, who did survive, unless he was seised by force of the intail, for it is in the election of the demandant to name him or not. *Semb. Th. D. l. 11. c. 50. f. 1, 6, 7, 16. 3 Lev. 219.*

Nor the omission of a son, who was alien born. *Th. D. l. 11. c. 50. f. 15.*

Or, who had released, or committed felony, &c. *Th. D. l. 11. c. 50. f. 16.*

So it may be pleaded, that the demandant or plaintiff has (H. 28.) mistaken the demise supposed in his count: as in a writ of entry, Mistake of if the demandant say, that the tenant had no entry but after a the demise, demise made by A. to B. *ne lessa pas* is a good plea. *Th. D. l. 11. c. 52. f. 2.*

So, in waste against an assignee of a lessee for years, a mistake of any demise supposed, is a good plea. *5 Ed. 3. 228. Th. D. l. 11. c. 52. f. 10.*

So, in waste against a husband and wife, upon a demise supposed to both, it may be pleaded, that the demise was to the husband alone. *6 Ed. 3. 250. Th. D. l. 11. c. 52. f. 12.*

So,

So, in waste upon a demise supposed by his brother, that the demise was made by his father, and confirmed by his brother. 8 *Ed.* 3. 392. *Th. D. l. 11. c. 52. f. 14.*

So, in waste upon a lease made by himself, that the lease was by his father, and confirmed by himself. 9 *Ed.* 3. 449. *Th. D. l. 11. c. 52. f. 14.*

Or, that the lease was by the plaintiff and his wife. *Th. D. l. 11. c. 52. f. 16.*

So, in waste against two upon a lease to them and to *A.* the father of the plaintiff for their lives, and to the heirs of *A.* That the lease was to the defendants alone for life, remainder to *A.* and his heirs. 24 *Ed.* 3. 21, [28.] *Th. D. l. 11. c. 52. f. 17.*

So, in waste by a woman upon a lease by her and her husband, that the lease was by the husband and the plaintiff, and also by a sister of the plaintiff and her husband now alive. 22 *H.* 6. 28. [24.] *Th. D. l. 11. c. 52. f. 21.*

So, in waste upon a lease by the father of the plaintiff, that the lease was by the father, and his wife now alive. *Th. D. l. 11. c. 52. f. 28.*

So in a writ of entry, if the demandant alledge a lease by *A.* to *B.* the defendant may plead, that *C.* demised and not *A.* *Kelw.* 93.

But it is sufficient, if the substance, and effect of the demise be pursued; as, if a man bring a *dum fuit infra etatem* against his own lessee, a plea, that the demise was made by the demandant, and another his jointenant, is not good, if the other be dead. *Th. D. l. 11. c. 52. f. 3, 11.*

So in a *cui in vita* supposing that the tenant had no entry but by *S.* to whom her husband demised, it is no plea, that the husband demised to *S.* and his wife. *Th. D. l. 11. c. 52. f. 4.*

So if two parceners make a demise, and one of them die without issue, the other shall have waste, supposing the demise from herself only. *Per Finchden*, 46 *Ed.* 3. 17. *Th. D. l. 11. c. 52. f. 18.*

So, if waste be brought upon a demise by the plaintiff, if the defendant plead that the plaintiff and three others demised, reserving the reversion to them four and their heirs, the plaintiff may reply, that the three released to him and his heirs. 46 *Ed.* 3. 17, 33 *H.* 6. 4. *Th. D. l. 11. c. 52. f. 18.*

(H. 29.)
Mistake of
the estate.

So it may be pleaded in abatement, if the demandant sue by an action of a higher nature than his estate allows: as, if tenant in tail bring a writ of right, it may be pleaded, that the demandant had nothing the day of the writ purchased, except to him and the heirs of his body. *Th. D. l. 11. c. 44. f. 3.*

So, if he bring a writ of *cofsnage*. 4 *Ed.* 3. 139. *Th. D. l. 11. c. 34. f. 7.*

So in waste, if the plaintiff intitle himself by descent, it may be pleaded, that he is in by devise. *Lut.* 1557.

And it is not necessary to traverse the descent; for it is falsified by the plea. *Lut.* 1558.

Yet the traverse will be good upon a general demurrer otherwise, upon a special demurrer. *R. Lut.* 1558.

So,

So, if the demandant or plaintiff mistake the estate of the tenant or defendant: as, in waste against one as tenant in dower, it may be pleaded, that she held by gift made to her former husband and her in *frank-marriage*. 18 *Ed. 3. 32. b. Th. D. l. 11. c. 53. f. 3.*

So, in waste against one as tenant by the curtesy, that *A.* was seised and devised to him for life. *Semb. 29 Ed. 3. 34. [27.] Th. D. l. 11. c. 53. f. 4.*

So, in an account against one as *bailee*, that he was guardian in socage. *Th. D. l. 11. c. 35. f. 13.*

So, if the demandant mistake the entry supposed to have been made by the tenant: as, in a writ of entry against a dean and chapter supposing that they had not entry but by *A.* the father of the demandant, it may be pleaded in abatement, that the dean found the church seised of the tenements. *Th. D. l. 11. c. 54. f. 14.* (H. 30.) Mistake of the entry.

So, in a writ of entry for lands, into which the tenant had not entry, till after a disseisin which *H.* made to the ancestor of the demandant, it may be pleaded, that he entered as son and heir to *H.* and so the demandant might have had a writ of entry within the degrees. 5 *Ed. 3. 216. Th. D. l. 11. c. 54. f. 17.*

Or, that the tenant and *H.* are the same person, and that *H.* infeoffed *B.* who granted by fine to the tenant; for then the demandant might have had a writ in the *per* and *cui*, and not in the *post*. *Th. D. l. 11. c. 54. f. 22.*

So it may be pleaded in abatement in *replevin*, that the property of the goods taken is not in the plaintiff. *Th. D. l. 11. c. 46. f. 1. Reg. pl. 292.* (H. 31.) Mistake of the property.

And in *replevin* by two, that the property is in one only. *Th. D. l. 11. c. 46. f. 2. 8. 2 Ed. 4. 23.*

Or, that the property of part is in one alone, and the property of other part in the other alone. 10 *Ed. 4. 4. 2 R. 3. 15. b. Th. D. l. 11. c. 46. f. 9.*

So, in *replevin* by husband and wife, that the property is in the husband alone. *Ass. Ent. 6.*

But it is sufficient, if the plaintiff had a special property, though the general property was in another: as, if the cattle taken were levant and couchant upon his land. *Th. D. l. 11. c. 46. f. 3.*

Or, if the goods taken were in his ward, or custody. 47 *Ed. 3. 12. Th. D. l. 11. c. 46. f. 3.*

Or, if they were the cattle of his villein. *Th. D. l. 11. c. 46. f. 4, 6.*

And, property in another, is no plea in trespass. 27 *H. 8. 21. 20 H. 6. 19. Th. D. l. 11. c. 46. f. 6.*

(H. 32.) For Matters *ex post facto*.

So it may be pleaded in abatement of the writ, that since the last continuance the plaintiff or demandant died. *Reg. pl. 293. Ass. Ent. 8.* (H. 32.) Death of the demandant or plaintiff.

So, a writ shall abate, if the demandant or plaintiff dies after verdict, and before the day in bank; for this matter may be moved in arrest of judgment. *Cro. Car.* 509. *Cont' per Berkley, Mar.* 65. *Acc.* 1 *Sid.* 143.

Or, the court in their discretion may put the party to a writ of error. *R.* 1 *Sal.* 9.

So, if the husband dies in an action by husband and wife; for they are but one person. *Cro. Car.* 509.

Yet by the *stat.* 17 *Car.* 2. 8. made perpetual by *stat.* 1 *Jac.* 2. 17. In no action real, personal, or mixed shall the death of either party between the verdict and judgment be error, so as judgment be entered within two terms after verdict. *Vide post.* (J. 34.)

[Yet his representative must sue out *scire facias* before he can have execution; and if execution be executed without it, it shall be set aside, and the money levied returned. *Earl v. Brown, P.* 24 *G.* 2. 1 *Wils.* 302.]

And by this statute, the judgment relates to the life of the party, so as to avoid mesne debts payable by his executor. *R.* *Ray.* 210. 1 *Lew.* 278.

So by the common law, if the plaintiff dies after the day in bank, judgment shall be entered; for no continuances are afterwards entered. 1 *Vent.* 59, 90. 1 *Sid.* 462.

But an action by a mayor and commonalty does not abate by the death of the mayor. *Tb. D. l.* 12. c. 1. f. 15. *Cont.* 1 *Sal.* 398.

Nor an action by a dean and chapter, by the death of the dean, if there was another dean chosen before the day in court, and the first dean was not named by his name of baptism. *Tb. D. l.* 12. c. 1. f. 15.

Otherwise though he was not named by his Christian name, if there was no other dean before the day in court. *Tb. D. l.* 12. c. 1. f. 15.

So an information does not abate by the death of the attorney-general. 2 *Bul.* 261.

Nor by the death of a relator, who informs for the king. 2 *Bul.* 134. 262. *Hard.* 161.

Otherwise if an informer, who sues *qui tam*, &c. dies. *R.* 2 *Bul.* 134. *R.* that the attorney-general in such case may proceed for the king. *Cro. El.* 583. *Vide Mo.* 541.

Nor an appeal in the spiritual court by the death of the appellant. *R.* 2 *Lew.* 6.

Nor any suit there by the death of the party. *Agr.* 2 *Roll.* 20. 1 *Vent.* 134. *Cont.* if the party die before issue. 1 *Leo.* 278.

[If plaintiff in replevin dies after declaration, and before avowry, there can be no writ *de retorno habendo*, but defendant may distrain again. *Cutfield v. Corney, M.* 32 *G.* 2. 2 *Wils.* 83.]

[If plaintiff dies after rule by consent to refer to prothonotary, before his report his executor may be made party to rule, and prothonotary proceed without defendant's consent. *Barnes* 210.]

* Or if there be a special verdict in vacation, and plaintiff die in term, judgment (by consent) may be entered as of the first day

day of the present term. *Pond v. King, M. 19 G. 2. 1 Will.*
124.*.

So in all real actions, the death of one of the demandants or plaintiffs since the last continuance may be pleaded in abatement : as, in an assise. *Vide Bend. pl. 74.* (H. 33.)
Death of one of the demandants or plaintiffs.

Though one of the demandants be summoned and severed, and then dies : as in an assise, or other original action by jointenants, if the one is summoned and severed, and dies. 10 Co. 134. a.

So in a real action by parceners, where one is summoned and served, and dies. 10 Co. 134. a.

And this, as well when the parcener has issue, as when not. 10 Co. 134. a.

So in a *scire facias* in a real action : as, in a *scire facias* upon a judgment in an assise by husband and wife, if the husband die, the *scire facias* abates. *Bro. Brief 297.*

So, generally, in all actions, the death of one plaintiff since the last continuance, may be pleaded in abatement. *R. 2 Lev. 82. Cart. 193.*

As in attain. *R. Mo. 9, 17.*

Though the property survives to the other ; as, in *trover*. *R. 2 Lev. 82. 1 Vent. 235. Ray. 463. Per three J. R. Cont. 2 Bul. 262.*

In a writ of error. 10 Co. 135. a. *R. Yel. 208. 3 H. 7. 1. Co. Ent. 271. c. 2 Bul. 231. 1 Sho. 187. R. 1 Sal. 319.*

In *indebitatus assumpsit*. *R. 3 Mod. 249.*

In trespass by jointenants. *R. 2 Cro. 19. Dub. Cro. Car. 509.*

In execution sued upon a statute-merchant. *25 Ed. 3. 38. [T. 25 Ed. 3. 81. pl. 13.]*

But now by the *stat. 8 & 9 W. 3. 10.* If one of the plaintiffs die, and the cause of action survive, the writ shall not abate, but the death being suggested on the roll, the action shall proceed at the suit of the surviving plaintiff. *2 Mod. Ca. 115.*

And if the plaintiff die, (though but one,) where the action might be originally prosecuted by his executors or administrators, after interlocutory judgment and before final judgment, the action shall not abate.

But in personal, or mixed actions, for a chattel or entire thing, which survives to the other, if the one be summoned and severed, and die, the writ shall not abate. 10 Co. 134. b.

As in a writ of ward of the body. 10 Co. 134. b.

In *detinue* of charters. 10 Co. 135. a.

In a *quare impedit*. 10 Co. 134. b. 7 Co. 26. b.

In a writ of debt by two executors. 10 Co. 134. a. 135. a. *Read and Redman. Th. D. l. 12. c. 1. f. 5. Adm. 1 Vent. 235.*

So in a judicial writ, where the one is summoned and severed, and dies, the writ shall not abate ; as, in a *scire facias* by jointenants. 10 Co. 134. b.

Or, by parceners, where she who dies has no issue. 10 Co. 134. b.

Otherwise,

Otherwise, if she has issue.

Nor in a judicial writ in personal actions, if the one die, though he be not summoned or severed; as, in a *quid-juris clamat*. 10 Co. 135. a. Cart. 194.

So the writ shall not abate by the death of one of the plaintiffs, when the survivor cannot have another writ without prejudice, though he be not summoned and severed: as in a *quare impedit* upon a plenarty and six months passed, or when a lapse will incur. 10 Co. 134. b. 7 Co. 26. b. 2 Cro. 19.

Though the *quare impedit* be by husband and wife, and the wife die. 7 Co. 26. b.

So the writ shall not abate by the death of one of the plaintiffs when it is only for a discharge: as, in an *audita querela*. 10 Co. 135. a. Yelv. 209. 2 Cro. 19.

[So if husband and wife sue in prohibition, and husband dies, the suit is not abated. *Middleton v. Crofts*, M. 11 G. 2. B. R. H. 395.]

So, if the informer die, the attorney-general may proceed for the king's moiety. R. Mo. 541. Vide Cro. El. 583.

A plea in abatement, that two plaintiffs are dead, is good, though the death of one is sufficient. 2 Lev. 82.

But a plea of the death of a plaintiff or defendant is not good, if it conclude with judgment of the writ *et quod breve cassetur*; for it ought to pray judgment *si curia ulterius velit procedere*; for the writ was abated in fact before. R. 3 Lev. 120. Vide post. (J. 12.)

(H. 34.)
Death of
the tenant
or defend-
ant.

So, the death of the tenant or defendant since the last continuance may be pleaded in abatement.

So, the death of the defendant after a verdict before the day in bank, may be moved in arrest of judgment. Cro. Car. 509. 1 Sid. 131.—D. that it was not proper in arrest of judgment, because the parties had no day to plead; but it was error. 3 Leo. 5.

So, death after garnishment in *detinue* abates the writ. 21 H. 6. 39. [35.] Tb. D. l. 12. c. 2. f. 37.

So, the death of the defendant any time before the assises. R. 1 Sal. 8. Vide ante (H. 32.)

But by the stat. 17 Car. 2. 8. it shall be aided, if either party die between the assises, and the day in bank. So if after the assises begin. R. 1 Sal. 8.

So, by the death of the defendant in the spiritual court, before issue, viz. *Ante litem contestationem*, the suit ceases. D. 1 Leo. 278.

But a writ shall not abate by the death of the defendant, after the first judgment, and before final judgment; as, in an account. R. 1 Leo. 263. 3 Leo. 68.

Or, after judgment in trespass, before a writ of inquiry. 1 Leo. 263. 3 Leo. 68.

And the writ does not abate, by the death of the defendant in error upon a judgment in dower; but a *scire facias* shall go against her executors. R. Telv. 113.

So,

So, generally, in error, by the death of the defendant the writ does not abate, but a *scire facias ad audiend' errores* shall go against his executors. *R. 2 Bul. 231. Per Holt, Sho. 186.*

Otherwise, where upon a writ of error the record itself is not removed, but only the transcript; for there, by the death of the defendant the error abates; as, in error in the exchequer-chamber upon a judgment in the king's bench. *Semb. 1 Sho. 187. Semb. Cont. Mo. 701.*

So, by the death of the defendant in the spiritual court, after *litis contestationem*, the suit does not cease. *1 Leo. 278.*

Nor in the admiralty. *Semb. 1 Sal. 33.*

Nor, by the death of the appellant, after an appeal from a sentence in the spiritual court. *R. 2 Lev. 6.*

So, the death of one of the tenants or defendants in a real action; as, the death of one jointenant in an assise. *Bro. Brief (H. 35.) 295. Adm. Bend. pl. 74.* Death of one of the tenants or defendants.

The death of one of the tenants in a *præcipe quod reddat*. *Bro. Brief 400.*

In a right of advowson against parceners or jointenants. *R. Cro. Car. 574, 583, 585, 589. Hard. 113. Jon. 452.*

In an assise against husband and wife, if the husband die. *Bro. Brief 295.*

In an action upon the case against two executors, if one die. *Sho. 56.*

If he dies after issue joined, before trial. *Sho. 56.*

So in a personal action for a duty; as, in debt. *50 Ed. 3. 7. b. 40 Ed. 3. 26. b. Th. D. l. 12. c. 2. f. 30.*

In debt against three executors. *R. 1 Leo. 44. Adm. Pl. Com. 186. b. Bro. Brief 234.*

In *detinue* of charters against executors. *2 H. 4. 18. b. Th. D. l. 12. c. 2. f. 34.*

In *assumpsit* against two executors. *R. Ray. 131. 1 Lev. 165. 1 Sid. 259.*

In an action upon the case for diverting a water-course. *Carth. 149.*

In an action for words against husband and wife, if the wife die. *R. Hob. 129. Hard. 151, 152.*

In a writ of ward. *Bro. Brief 90.*

So, in an account. *Dub. Cro. El. 701. D. Acc. Ray. 131.*

In error, against the three plaintiffs in the first action. *3 H. 7. 1. 14 H. 7. ult. Vide 2 Bul. 231. Th. D. l. 12. c. 2. f. 42.*

So, in an action against two, though the sheriff returns a *cepi corpus* for both. *Bro. Brief 91.*

But an action shall not abate by the death of one of the tenants or defendants, when the other has the whole by survivorship: as, in *mort d'ancestor* against two jointenants. *Th. D. l. 12. c. 2. f. 5. Cro. Car. 574. 3 Mod. 249. Hard. 113.*

In error against an heir and terre-tenants, and the heir dies. *42 Aff. pl. 22. Th. D. l. 12. c. 2. f. 25.*

Nor,

Nor, when the action is founded upon a tort: as, in an assise, against two disseisors, if the one die. 23 *Aff. pl.* 10. *Tb. D. l. 12. c. 2. f. 4.* *Dy.* 175. a. *Cro. Car.* 574.

In trespass. *Bro. Brief* 80. *R. Yel.* 209. *R. 2 Lev.* 82. *R. Cro. El.* 145. *Tb. D. l. 12. c. 2. f. 36.*

Though they are charged jointly. 2 *Cro.* 19.

In ejectment. *R. Mo.* 469. *Tb. D. l. 12. c. 2. f. 27.*

In ejectment against husband and wife, if the husband dies; for it is in nature of trespass, and judgment shall be entered against the wife alone. *R. 2 Cro.* 356. *Hard.* 161.

In trover. *D. 3. Mod.* 249.

In conspiracy. *Bro. Brief* 380. *Qu. Tb. D. l. 12. c. 2. f. 27.* 44 *Ed.* 3. 22.

In deceit to reverse a fine of land in ancient demesne; for it is in the nature of trespass. *R. Mo.* 13. 3 *Leo.* 3. *R. Bend. pl.* 94. *R. 4 Leo.* 197.

In an action for an escape against the two sheriffs of York. *R. Cro. El.* 625. *Vide Hard.* 115. *Semb. Hard.* 161.

In replevin. *D. Cro. El.* 625. *R. Cro. El.* 574. 2 *Cro.* 19. *R. Dy.* 175. a. If the defendants avow *en auter droit.* *Mo.* 395.

Otherwise, if the defendants in replevin make conuzance in their own right. *Mo.* 395.

In ejectment of ward, or ravishment of ward. 12 *H.* 4. 10. b. *Tb. D. l. 12. c. 2. f. 31.*

In a *quare impedit.* *Th. D. l. 12. c. 2. f. 35.* 7 *Co.* 26. b. *Hard.* 113. *Dy.* 194. b. 9 *H.* 5. 6. b. 11 *H.* 6. 53. a.

So, in trespass against husband and wife, if the husband dies, *Dub. Cro. Car.* 509. *Semb. Cont. Tb. D. l. 12. c. 2. f. 10, 17.*

So, in an action upon the case against husband and wife, where the husband is named for conformity; as, for words by the wife. *R. Hard.* 151.

Or, if the wife dies. *R. Cro. Car.* 509.

Nor, in a *warrantia chartæ* upon a warranty by husband and wife, and the heir of the husband, if the wife dies. *R. Mo.* 859.

Nor, when the action is only for a discharge; as, in an *audita querela.* 10 *Co.* 135. a. *Tb. D. l. 12. c. 2. f. 32.*

Nor, by the *stat. 8 & 9 W.* 3. 31. In partition.

So, in error against executors, if one of them dies, the writ does not abate. *R. Cro. El.* 652.

Yet, where the action is founded upon a tort, the death of one of the defendants the day of the writ purchased will be a good plea in abatement: as, in trespass. *Bro. Brief* 175. *Hard.* 114. *Vide ante* (E. 16.)

So in a *quare impedit.* 11 *H.* 6. 53.

But now, by the *stat. 8 & 9 W.* 3. 10. If one defendant die, and the action survive against the other, it shall not abate; but the death being suggested on the roll, the action shall proceed against the surviving defendant.

(H. 36)
Death of
a stranger.

So the action shall not abate by the death of any, who is not party to the writ; as, *warrantia chartæ* being brought by the tenant

nant in the affise, does not abate by the death of the demandant in affise. *Th. D. l. 12. c. 10. f. 1.*

A writ of ward does not abate by the death of the heir. *Th. D. l. 12. c. 10. f. 2.*

Nor a writ of ravishment of ward. *Th. D. l. 12. c. 10. f. 6.*

Otherwise, of a writ of ward of the body. *9 Ed. 4. 53. Th. D. l. 12. c. 10. f. 6.*

So a writ of mesne does not abate by the death of the lord paramount. *Th. D. l. 12. c. 10. f. 11.*

Nor a writ of waste against tenant *pur auter vie*, by the death of *cestuy que vie*. *Th. D. l. 12. c. 10. f. 9.*

But if, by the death of a stranger, no cause of action remains, the writ shall abate by his death: as, if the mesnalty be forejudged, a writ of mesne shall abate by the death of the lord paramount; for the tenant cannot be attendant upon a dead person. *Th. D. l. 12. c. 10. f. 11.*

A writ against tenant *per auter vie* abates by the death of *cestuy que vie*, and the entry of him in the reversion. *Th. D. l. 12. c. 10. f. 4, 5.*

Waste by tenant in tail against tenant for life abates by the death of the issue, by which he becomes only tenant in tail after possibility of issue extinct. *2 H. 4. 20, 22. 3 H. 4. 5. Th. D. l. 12. c. 10. f. 7.*

So the action shall not abate by the death of any, who is not party to the writ, though he be named upon record: as, if a vouchee die after entry into warranty, or before. *Th. D. l. 12. c. 3. f. 2.* For the tenant may revouch the heir. (H. 37.)
Death of
the vou-
chee, &c.

If husband and wife are vouched, and the husband dies. *18 Ed. 3. 17. Th. D. l. 12. c. 3. f. 6.*

So, if tenant by reſceit, or he who prays to be received, dies. *Th. D. l. 12. c. 4.*

So, if the tenant prays in aid, and the prayee dies. *Th. D. l. 12. c. 5.*

So in *detinue*, if the garnishee dies after a plea to issue. *Th. D. l. 12. c. 6.*

So, if the attorney named upon the record dies. *5 H. 7. 3.*

At common law all actions abated by the demise of the king, and the defendant went without day. (H. 38.)
Death of
the king.

And all pleas, and process was discontinued. *7 Co. 30. a.*

And all process not returned, was lost. *7 Co. 30. a. Bend. pl. 121.*

Though it were in an appeal, that abates. *2 H. 7. 10. b.*

So, of a writ for promotion of serjeants. *2 Cro. 1.*

But by a general re-ſummons, or re-attachment, the original or issue, (if it was joined) shall be revived; for it was a full record. *7 Co. 29. b. 1 Ed. 4. 1. a.*

And by a special re-ſummons, or re-attachment, all process, though not upon record, shall be revived; as, voucher, garnishment, &c. *7 Co. 29. b.*

Yet

Yet in an appeal the re-attachment must be within the year, as well as the original. 2 H. 7. 10. b.

But now, by the *stat. 1 Ed. 6. 7.* By the death of the king no action, suit, bill, or plaint, depending between party and party in any court of record, shall be discontinued and put without day; but the process, pleas, demurrers, and continuances, shall stand good in the same condition as if the king had lived.

And therefore, all judicial writs or process shall be executed in the time of the successor. 7 Co. 30. a. R. 1 And. 45.

And all process upon an original, which was awarded and returned in the time of the predecessor. Dy. 165. a. Bend. pl. 121. R. 1 And. 45.

And an action upon a penal statute by *qui tam*, &c. and all proceedings upon it stand, notwithstanding the demise of the king, as well as other actions; for this action is at the suit of the party. R. Cro. Car. 10. Hutt. 82. R. 3 Lev. 207. Vide action upon *stat.* (E. 2.)

And a *latitat*; for that is founded upon a bill of *Middlesex*, and is depending. R. Tel. 52.

Yet the *stat. 1 Ed. 6. 7.* does not extend to actions in a county court, or other court not of record. 7 Co. 30. b.

Nor to actions in which the original is not returned; for before the return it is not depending. 7 Co. 30. a. R. 1 And. 44, 5. Bend. 79.

Except in cases of necessity: as, in an appeal, if the year will expire before the return, the plaintiff by the common law shall have a *certiorari* to the sheriff returnable in B. R. and upon that a re-attachment; though the writ comes into court by *certiorari*, and not by the return of the sheriff. 7 Co. 30.

So, in a *formedon* against a pernor of the profits within a year after the title accrued: if the year will expire before the return, the plaintiff shall have a *certiorari* and re-attachment. 7 Co. 30. b.

So the statute extends not to actions at the suit of the king: and therefore, a *quare impedit* by the king is abated by his death; or other original writ brought by the king. 7 Co. 31. 2 Cro. 14.

[And if the king brings a writ of error in *quare impedit*, it abates by his death. *Rex v. Archbishop of Ardmagh*, T. 3 G. 2. Str. 837. Fort. 213.]

So in an information by the king, all the proceedings upon it are abated and lost. 7 Co. 30. b. 2 Cro. 14.

So, in an information by the attorney-general for the king. 7 Co. 30.

In an information by *qui tam*, &c. 7 Co. 30. Vide Mo. 748. as to the king's part. Vide Mo. 541.

[But information in the nature of *quo warranto*, does not abate. *Rex v. Powell*, M. 1 G. 2. Str. 782.]

In an indictment all proceedings upon it are abated and lost. 7 Co. 30, 31. 2 Cro. 14.

But the information and indictment stand, being upon record, and to avoid the mischiefs that would otherwise ensue; but the defendant

defendant shall appear and plead *de novo*. 7 Co. 30. b. 2 Cro. 14.
3 Lev. 207. R. Mo. 748.

And that, after issue and verdict. 2 Cro. 14.

And, upon such information for the king alone, or by *qui tam*, &c. there shall be a re-*summons*, or re-attachment. Mo. 748.
Mod. Int. 403.

So, if an extent upon an outlawry be traversed, plea, replication, and demurrer upon it; all abate, except the outlawry and extent. R. Hard. 136.

Yet in debt by *qui tam*, &c. upon a penal statute, the proceedings are not abated. R. 3 Lev. 207.

So informations in *English* are not discontinued; because there are no continuances upon them. Mo. 748.

And now by the *stat.* 1 Ann. 8. it is enacted, That no writ, plea, or process, or other proceeding on any indictment, or information, or for any debt, or account to her majesty or successors, shall be discontinued, and put without day by her or their death, but shall continue in force, and may be proceeded upon.

And no original writ, writ of *nisi prius*, commission, process, or proceeding out of any court of equity, or upon any office or inquisition, nor any writ of *certiorari*, or *habeas corpus* in any cause criminal or civil, nor any writ of attachment or process for contempt, shall be abated or discontinued by the death of the queen or her successors. Vide Officer (K. 10.)

And the said statute shall extend to *Ireland*, *Jersey*, *Guernsey*, and all her majesty's dominions in *America*, or elsewhere.

[*Scire facias* to repeal grant of a market, is an original writ, and within the general words of *stat.* 1 E. 6. c. 7. and 1 Ann. c. 8. and does not abate. *Rex v. Eyre*, H. 3 G. Strange 43.]

When commissions, &c. are determined by the king's death, Vide in Officer. (K. 10.)

So, by the common law, an assise abates by the death of the justices before issue. 4 H. 7. 8. Tb. D. l. 12. c. 8. f. 2. (H. 39.)

So, for the not coming of the justices at the day, to which the assise was adjourned. Cro. El. 12. Death of the justices.

Though the adjournment was to *Serjeant's Inn*, and the term being adjourned from *Westminster* to *Hertford*, was there adjourned to the next term. Cro. El. 12.

So a writ of error directed to the chancellor and treasurer in the exchequer chamber abates by the death of the chancellor or treasurer, though not named by their proper names: so that no judgment shall be given, till a new writ of error. R. Jon. 365.

But a writ of right does not abate by the death of the lord. Brañ. l. 5. c. 3.

And by the *stat.* 1 Ed. 6. 7. Assise of *novel disseisin*, *mort d'ancestor*, *juris utrum*, or attain, shall not be discontinued, or put without day by death, new commission, association, or the not coming of the same justices, or any of them.

So

(H. 40.) So it may be pleaded in abatement to an assise by a daughter
Other act of as heir, That since the last continuance a nearer heir is born.
God.

32 H. 6. 35. Th. D. l. 12. c. 14.

So, in an assise by an heir against his guardian. 11 Aff. pl. 6.

So, in a right of ward of the body, it may be pleaded, That
the heir became of full age pending the writ. 9 Ed. 4. 52. [50.]

11 H. 6. 8. Cont. Th. D. l. 12. c. 15.

So, in an action by an administrator *durante minori etate* of A.
That A. has attained his age of 21 years. Lut. 342. Dub.
Mo. 462.

But it is no plea, unless such act of God defeats the whole ac-
tion; as, in ravishment of ward, it is no plea, That the heir be-
came of full age pending the writ; for the plaintiff shall proceed
for damages. 9 Ed. 4. 52. [50.] Th. D. l. 12. c. 15.

(H. 41.) So it may be pleaded in abatement, That the plaintiff is pro-
fessed pending the writ. Th. D. l. 12. c. 11. f. 1.

But, to profession pleaded, the plaintiff may reply, that he
was afterwards deraigned. 9 H. 5. 1. Th. D. l. 12. c. 11.
f. 2.

And it is no plea in abatement that the tenant or defendant
is professed. Th. D. l. 12. c. 11.

Vide ante, (E. 5. F. 1.)

(H. 42.) So it may be pleaded in abatement, That the demandant or
Coverture. plaintiff took husband pending the writ. Th. D. l. 12. c. 12.
Aff. Ent. 9, 10. Vad. M. 68.

Or, that one of the demandants or plaintiffs took husband. Th.
D. l. 12. c. 12. f. 2.

Though there was a severance after coverture. Dub. Th. D.
l. 12. c. 12. f. 2. Agr. 10 Co. 134. b.

Though she married by coercion of the spiritual court, upon a
contract before the writ purchased. 4 H. 4. 55. Per Strange,
7 H. 6. 15. Th. D. l. 12. c. 12. f. 4.

But the writ does not abate by the taking of husband, unless it
be pleaded. Th. D. l. 12. c. 12. f. 3. R. 1 Leo. 169.

Nor, by a marriage after verdict, and before the day in bank.
4 H. 4. 1. 1 Sid. 143. Th. D. l. 12. c. 12. f. 5.

Nor, by a marriage after judgment, and before execution in
an appeal. 11 H. 4. 48. b. 21 Ed. 4. 87. [73.] Th. D. l.
12. c. 12. f. 6.

Nor, by a marriage after summons and severance. 10 Co.
134. b.

And the plaintiff may reply, that her husband is dead, and that
she is now sole. 9 H. 5. 1. Th. D. l. 12. c. 12. f. 7.

Or, that there is a divorce between them. *Ibid.*

That the day of the original purchased, *et semper postea*, she was
sole, and not covert, &c. Aff. Ent. 9.

So, if the replication be, That after the original purchased
non cepit virum, it is well. R. Lut. 1640. 1. *Vide Aff. Ent. 10.*

And the writ does not abate, if the defendant takes husband
pending the writ. Adm. 2 Rol. 53.

[If

[If a defendant feme sole at the time of bringing the writ takes husband before appearance, and gives bail by her married name, yet the writ does not abate: nor it can be assigned for error. *King v. Jones, T. 2 G. 2. Str. 81. Ld. Raym. 1525.*]

[If defendant is arrested in inferior court, marries, and removes plaintiff by *habeas corpus*, coverture is no good plea. *Barnes 355.*]

But, if the defendant takes husband after issue joined, and has judgment which is reversed, before the wife be taken in execution for the costs in error, there ought to be a suggestion upon the roll, that she was married; otherwise, the husband and wife may have false imprisonment. *R. Lane, 48, 52.*

Vide ante (E. 6. F. 2.)

So it may be pleaded to an action, by husband and wife, That they are divorced pending the writ. *Th. D. l. 12. c. 13. 6 Ed. 3. Divorce. 249. 25 Ed. 3. 39. b. [82.]*

Whoever pleads a divorce, must shew before whom, and for what cause. *9 Ed. 4. 25. [24.] Th. D. l. 12. c. 17. f. 12.*

So it might be pleaded in abatement, that the plaintiff or demandant had accepted a dignity pending the writ; as, that he was made archbishop or bishop. *Vide ante (E. 20. F. 19.)* (H. 44.) Acceptance of dignity.

Or duke, marquis, or earl.

Or abbot. *Th. D. l. 12. c. 16. f. 3.*

Or knight. *7 H. 6. 15, 40. Th. D. l. 12. c. 16. f. 4.*

'Till by the *stat. 1 Ed. 6. 7.* it was enacted, That no writ, suit, &c. shall abate, though the plaintiff or demandant be made duke, archbishop, marquis, earl, viscount, baron, bishop, justice of one bench or other, knight, or serjeant at law, pending the suit.

And all knights are within the statute; as, knights of the Bath, &c. *R. 1 Sid. 40.*

Yet, if one be made a baronet, the writ shall abate; for that is not within the statute *1 Ed. 6. 7.* unless he is a knight also. *R. 1 Sid. 40. R. Litt. R. 81. Dub. Cro. Car. 104.*

Nor any new dignity. *Litt. 81.*

Nor a viscountess, baroness, &c. which are not named. *D. Litt. 81.*

But the writ does not abate, if the dignity accrues to the demandant or plaintiff by the mere act of God; as if the dignity of earl descends to him pending the writ. *32 H. 6. 34. [29.] Th. D. l. 12. c. 16. f. 6.*

Nor, if he, who has the dignity of an earl, be made duke, marquis, &c. *Dav. 60. d.*

So it may be pleaded in abatement, that the plaintiff, who sues as executor, took administration pending the writ. (H. 45.) Acceptance of administration.

But it is no plea, that a defendant, sued as executor, took administration pending the writ. *1 Leo. 69.*

(H. 46.)
Deprivation,
&c.

So, it may be pleaded, that the plaintiff or demandant is deprived pending the writ; as, if an abbot be deposed. *Tb. D. l. 12. c. 17. f. 5.*

If the warden of an hospital be deprived by his ordinary; for he loses his name. *8 Aff. pl. 29. 31. Tb. D. l. 12. c. 17. f. 4.*

So a writ abates by the resignation of the plaintiff.

Though he be afterwards re-elected. *9 H. 5. 1. Tb. D. l. 1. 2. c. 17. f. 8.*

But a writ does not abate by deposition of a plaintiff, who sues as executor. *Per two J. Ow. 30.*

Nor, by translation of the plaintiff from one bishopric to another. *Tb. D. l. 12. c. 17. f. 7.*

Nor, by deprivation of the tenant or defendant; as, if an abbot be deposed pending a writ against him. *Tb. D. l. 12. c. 17. f. 2, 3.*

Nor, by resignation of the defendant; as, if a vicar resign pending a writ of annuity against him. *10 H. 6. 10. b. Tb. D. l. 12. c. 17. f. 10.*

If a man pleads deprivation, he ought to shew before whom, and for what cause. *9 Ed. 4. 25. [24.] Tb. D. l. 12. c. 17. f. 12.*

(H. 47.)
Default of
the demandant
or plaintiff.
As a disseisin
by the
demandant
pending the
writ.

So, if the demandant or plaintiff usurps a right to that which he claims, his writ shall abate; for he destroys his action by his own act: as if he disseise the tenant pending an assise. *Tb. D. l. 12. c. 21. f. 3, 11.*

Or, seize the body of the infant pending a right of ward. *Tb. D. l. 12. c. 21. f. 9.*

And the tenant shall plead this after default. *10 Ed. 3: 541. Tb. D. l. 12. c. 21. f. 7.*

But it shall not be pleaded after verdict, in arrest of judgment. *5 Ed. 3. 201. Tb. D. l. 12. c. 21. f. 5.*

(H. 48.)
Entry pending
the writ.

So, if the demandant enter pending the writ. *40 Ed. 3. 42. b. Lut. 38. Tb. D. l. 12. c. 21. f. 3.*

Or, enter into parcel, the whole abates. *Tb. D. l. 12. c. 21. f. 8, 10, 16, 17, 21. Lut 38.*

But an entry after verdict, and before judgment, does not abate the writ; for it cannot be pleaded. *R. 2 Brownl. 231. 235. R. Cro. El. 767.*

And it may be pleaded, *pending the writ*, before issue. *2 H. 8. 3. b.*

Or after issue, *since the last continuance*. *26 H. 8. 3. b. 2 Cro. 261.*

And therefore, the defendant ought to shew, how he entered, and at what time. *Lut. 39.*

And into what parcel in certain. *R. 2 Cro. 262.*

But it must be such an entry as makes him tenant of the land; and so pleaded.

And therefore, if the demandant goes upon the land without claiming any thing, the writ does not abate. *5 Ed. 4. 60. Pl. Com. 92. R. 1 Bul. 5, 9, 10. Tb. D. l. 12. c. 21. f. 18.*

And

And the demandant may reply, that the tenant re-entered, and is now tenant. *Th. D. l. 12. c. 21. f. 22.*

So, by an entry for a condition broken pending waste, the writ does not abate. *Qu. Th. D. l. 12. c. 21. f. 12.*

Entry into a park to hunt. *R. 2 Brownl. 231, 238.*

So, if the demandant demise the land to the tenant pending the writ. *Th. D. l. 12. c. 20.* (H. 49.) Demise, &c.

Or, if the plaintiff in a *quare impedit* present, and his presentee is instituted and inducted pending the writ. *4 Ed. 4. 19. [18.] Semb. Cont. Th. D. l. 12. c. 19. f. 2, 3.*

But in a *quare impedit*, if the bishop defendant admit the clerk, pending the writ, it does not abate. *40 Ed. 3. 26. Th. D. l. 12. c. 19. f. 1.*

So if the plaintiff in an assise for rent distrains for the rent. *Th. D. l. 12. c. 23. f. 1.* (H. 50.) Pursuit of

So in a *cessavit*, if he distrains for services pending the writ. *Th. D. l. 12. c. 23. f. 2.* other remedy.

So if the demandant recovers parcel against the tenant by another writ. *38 Ed. 3. 16. [13.] Th. D. l. 12. c. 30. f. 21.*

Otherwise, if his bailiff distrains without his privity or consent. *Th. D. l. 12. c. 23. f. 1.*

So, by distress for homage of the tenant, an assise for rent does not abate. *47 Ed. 3. 7. Th. D. l. 12. c. 23. f. 3.*

An assise of common of pasture abates, if the plaintiff uses the common pending the writ. *33 Ass. pl. 9.*

Otherwise, if the beasts come there by escape. *33 Ass. pl. 9.*

An assise of nuisance shall abate, if the plaintiff abates the nuisance pending the writ. *46 Ed. 3. 24. Th. D. l. 12. c. 25.*

So, if the plaintiff receives part of his demand pending the writ, the writ abates. *Th. D. l. 12. c. 22.* (H. 51.) Receipt of

As, in a bond with condition to pay a less sum, receipt of parcel part of the sum abates the suit. *5 H. 7. 41. a. Ass. Ent. 7.*

Th. D. l. 12. c. 22. f. 3.

So, receipt of part in debt upon a single bill. *Adm. Al. 63.*

And a plea of receipt of parcel abates the whole writ. *4 Ed. 4.*

35. Semb. 2 Vent. 135. Th. D. l. 12. c. 22. f. 2.

But it must be pleaded, since the last continuance. *Per Brian; H. 7. 41. a. Th. D. l. 12. c. 22. f. 3.*

Must shew an acquittance for the money received. *R. Al. 63.*

And it may be replied, that the receipt was for another debt. *Ass. Ent. 8.*

So, receipt of a collateral thing does not abate the writ: as, upon an obligation to deliver twenty quarters of wheat, if he had acceptance of fifteen *pendente brevi*. *R. Cro. El. 253, 260.*

So in all cases where the demandant relies upon a default, if he be found, tried, or adjudged against him, the writ abates. (H. 52.) Saving a default.

Th. D. l. 12. c. 28.

So in a writ against several, if the demandant relies upon the default of one of them, who saves his default, the whole writ shall abate. *Tb. D. l. 12. c. 27. f. 4.*

(H. 53.) So, if upon the return of the *grand cape*, the tenant wages his law of non-summons, the writ abates. *Tb. D. l. 12. c. 27.*

Or if the demandant refuses his law. *Tb. D. l. 12. c. 27. f. 6, 7, 13.*

And the judgment shall be, that the demandant *nil capiat per breve*, and the tenant *eat sine die*. *Co. Ent. 225. c.*

But if only one of the tenants makes his law of non-summons, the writ abates only for so much. *Tb. D. l. 12. c. 27. f. 3, 10, 11, 15.*

So, if the demandant release the default, the tenant may plead, without waging his law. *Co. Ent. 176. a.*

So, if the demandant be essoined at the return of the *grand cape*, the default is waived.

So the demandant may release the default at the day given for waging of law, or at the essoin day by assent of the tenant. *Co. Ent. 223.*

The tenant may wage his law of non-summons, where he was not regularly summoned. *Co. Ent. 225. c. Vide in Process (D. 1, 2, 3.)*

And he ought to have witnesses for his credit, when he wages his law: and this was enacted by *magna charta*, c. 28.

For the regular trial of non-summons, shall be by wager of law *duodecimā manu*. *Co. Ent. 225, 328. 2 Infl. 45.*

Though the court may allow a less number than twelve.

The tenant ought to wage his law in person, and not by attorney. *Co. Ent. 225. c.*

And at the day given for waging of law he may be essoined; but if he makes default at the essoin day, he shall lose his land. *Co. Ent. 328. a.*

But if a corporation aggregate, which cannot wage their law, insist upon non-summons, it shall be tried by the country. *Tb. D. l. 12. c. 27. f. 18.*

(H. 54.) If land be recovered by a stranger pending the writ, the writ abates. *Tb. D. l. 12. c. 30.*

So, a recovery of parcel abates the writ for that part. *Tb. D. l. 12. c. 30. f. 2.*

Though the recovery was by mispleading of the tenant. *18 Ed. 3. 28. b. Tb. D. l. 12. c. 30. f. 16.*

So a recovery in dower by default or render of the tenant, with an averment, that she had a right to recover. *Tb. D. l. 12. c. 30. f. 17.*

So, a recovery by the tenant against the demandant himself by default. *7 Ed. 3. 360. Tb. D. l. 12. c. 30. f. 7.*

So, an assignment of dower in chancery pending the writ, abates the writ for so much. *Tb. D. l. 12. c. 30. f. 19.*

(H. 54.)
Act of a
stranger.
Recovery
pending the
writ.

So, if two have a cause of action for the same thing, a recovery by one abates the writ of the other. *Tb. D. l. 12. c. 30. f. 27.*

But, if a recovery be pleaded, it ought to be pleaded, that execution is also sued. *Tb. D. l. 12. c. 30. f. 22.*

But if the recovery was not against the defendant, but against a stranger, it is no plea. *Tb. D. l. 12. c. 30. f. 3.*

So, it may be replied, that the recovery was by collusion. *7 Ed. 3. 358. Tb. D. l. 12. c. 30. f. 6.*

So if the tenant enfeoff another pending the writ, and afterwards disseise his feoffee, who recovers against him; such recovery does not abate the writ. *Tb. D. l. 12. c. 30. f. 9.*

Nor, a recovery by *nihil dicit*, upon a writ brought after the first writ purchased. *Tb. D. l. 12. c. 30. f. 11.*

Nor, a recovery by render, or default. *9 H. 6. 42. 7 H. 4. 15. b. Tb. D. l. 12. c. 30. f. 14, 16, 17, 18, 29.*

If a recovery be pleaded, it is a good replication, that the tenant was tenant the day of the writ purchased, and still is. *43 Ed. 3. 21. Tb. D. l. 12. c. 30. f. 31.*

So the writ abates, if the tenant or defendant by his plea shews, (H. 55.) that the king is seised: as, in an annuity against a prior, a plea, Seisin of the that the king has seised the priory into his hands, is good. *Tb. king. D. l. 12. c. 33. f. 1. 3.*

So, a recovery by judgment upon a verdict found for the king, pending the writ. *18 Ed. 3. 26. b. Tb. D. l. 12. c. 30. f. 15.*

So, it is a good plea, that the land was held of the king in chief, and the tenant died, whereby the land was seised into the hands of the king who is now seised. *Tb. D. l. 12. c. 33. f. 6.*

But the writ shall not abate, if the tenant enfeoff the king pending the writ. *Tb. D. l. 12. c. 33. f. 9.*

Or, if an office find a title in the king. *Tb. D. l. 12. c. 3. f. 12.*

So the writ abates, if the estate of the plaintiff or demandant (H. 56.) determines pending the writ: as, in annuity for an annuity granted until the defendant present him to a benefice, if the defendant pleads, that he did present him, and the plaintiff accepted it, the writ shall abate, and the plaintiff shall have debt for the arrearages. *4 Ed. 3. 123. Tb. D. l. 12. c. 18. f. 1.*

Or, if the defendant pleads, that he tendered a benefice to the plaintiff pending the writ. *19 H. 6. 54. 14 H. 7. 33. [32.] Tb. D. l. 12. c. 18. f. 1.*

So, if an annuity is granted for years, and the term elapses pending the writ. *34 H. 6. 20. b. 15 H. 7. 1. Sav. 28. Tb. D. l. 12. c. 18. f. 3.*

If, pending waste by tenant in tail, he becomes tenant in tail after possibility. *D. 1 Rol. 82.*

So an action against a villein abates by the entry of the lord pending the writ. *3 H. 6. 34. 4 H. 6. 14. Tb. D. l. 12. c. 29. f. 4.*

A writ against a mortgagee abates, if the mortgagor pays the money, and enters pending the writ. *39 Ed. 3. 36. [28.] 18 Ed. 4. 27. [26.] Tb. D. l. 12. c. 29. f. 2.*

An

An action against a disseisor abates if the disseisee enters pending the writ. *Th. D. l. 12. c. 29. f. 3.*

Or against the feoffee of a disseisor. *7 H. 6. 17. Th. D. l. 12. c. 29. f. 3.*

So, an assise by tenant by statute-merchant abates, if the time incurs. *D. Sav. 28.*

So, an ejectment abates, if the term expires before judgment, as to the land.

But, when the action is only for a recompence in damages, the writ does not abate by the determination of the plaintiff's estate; as in a *quare ejecit infra terminum*, if the term expires, the plaintiff shall recover the whole in damages. *D. Sav. 28. 11 H. 6. 8. [6.] Th. D. l. 12. c. 18. f. 2.*

So, in ejectment, if the term expires, the plaintiff shall have judgment for his damages. *R. Sav. 28.*

So, a writ of waste against a lessee for years does not abate, if the term expires pending the writ. *Th. D. l. 12. c. 18. f. 2. 11 H. 6. 8. [6.]*

Nor covenant against the lessee. *11 H. 6. 8. [6.] R. 1 Rol. 82. Th. D. l. 12. c. 18. f. 2.*

(I.) Form of Pleading in Abatement.

(I. 1.) Shall give a better Writ.

IF the defendant or tenant plead a plea in abatement, he ought generally to give a better writ to the plaintiff or demandant: as if he plead non-tenure to parcel, he ought to shew, who is tenant of that parcel. *10 Ed. 3. 497. Th. D. l. 15. c. 1. f. 8.*

If he plead non-tenure to parcel, when two manors are demanded, he ought to shew to which parcel. *5 Ed. 3. 144. [184.] Th. D. l. 15. c. 1. f. 2.*

If he plead, that there are three villis in *S.* he ought to shew in which of the villis the land lies. *R. Yel. 112.*

If he plead, parcel in another county, he ought to shew how much lies there. *4 Ed. 3. 137. Th. D. l. 15. c. 1. f. 2.*

If he plead, that he was never of the vill named in the addition, he ought to say, of what vill he was. *Th. D. l. 15. c. 1. f. 12, 13.*

If he plead to the jurisdiction of the court, he ought to shew, what other court has jurisdiction. *Sho. 192. Corp. 118.*

(I. 2.) When he need not.

But if the plea goes to the matter and substance of the writ, he need not give a better writ: as, in a *dum fuit infra etatem* upon a demise by himself, the defendant may say, that the lease was by the plaintiff and another, without giving another writ. *Th. D. l. 15. c. 1. f. 4.*

So, in a writ of entry, supposing that the tenant had not entry but by *A.* to whom *B.* released, &c. the defendant may plead,

plead, that *B.* did not lease to *A.* without saying to whom the lease was made. *Tb. D. l. 15. c. 1. f. 7.*

So, in waste upon a demise by the plaintiff's father, the defendant may say that the father of the plaintiff did not demise, without giving another writ. *6 Ed. 3. 260. 10 Ed. 3. 525. Tb. D. l. 15. c. 1. f. 5, 9.*

So he need not give another writ when the plea avoids the whole action of the demandant or plaintiff; as, if the tenant pleads non-tenure to the whole. *33 H. 6. 38. Tb. D. l. 15. c. 1. f. 13.*

Or, no such vill. *33 H. 6. 38. Tb. D. l. 15. c. 1. f. 13.*

Or, entry of the demandant or plaintiff pending the writ. *34 H. 6. 8. Tb. D. l. 15. c. 1. f. 14.*

And it is sufficient to give a good writ without giving a good demand: and therefore, if the defendant in dower says, that part lies in another vill, it is sufficient, without saying how much lies there. *17 Ed. 3. 44. Tb. D. l. 15. c. 1. f. 10.*

[If in *assumpsit* against two plaintiff shews he has outlawed one, the other shall not plead *in bar* that his partner was beyond sea at the time of the outlawry; but though he cannot give plaintiff a better writ, yet he should demand judgment whether the court would compel him to give further answer. *Symonds v. Parminter, T. 21 G. 2. Str. 1269.*]

(I. 3.) Shall not plead two Pleas in Abatement.

A man shall not plead two pleas in abatement; for that will be double: as, in an assise, the tenant shall not plead misnomer of himself, and if it be found against him, *hors de sons fee.* *Tb. D. l. 15. c. 3. f. 1.*

In *replevin*, the defendant shall not plead property in a stranger, and also that he took the beasts in another vill. *42 Ed. 3. 19. [18.] Tb. D. l. 15. c. 3. f. 16.*

Shall not plead two outlawries of the plaintiff in abatement. *Semb. Sho. 80.*

(I. 4.) But may, one after the other.

But one after the other, he may: as, he shall plead to the person of the plaintiff; and if that be over-ruled, he may afterwards plead to the form of the writ. *Tb. D. l. 10. c. 1.*

*It appears that a defendant may plead as many different pleas in abatement in *succession* as he pleases under these restrictions, 1st, that he do not invert the established order; 2dly, that the latter plea be not repugnant to the former; and 3dly, that the latter be not such as was waived by the former.*

(I. 5.) Or one to Part, and another to another Part.

So he may plead one plea in abatement of parcel and another to other parcel: as, in waste, he shall falsify the demise to part, and

and to the other part shall say, that it is not in the vill supposed by the writ. 8 *Ed. 3.* 402. *Th. D. l. 15. c. 3. f. 5.*

So non-tenure to part, and a recovery pending the writ to the other part. *Th. D. l. 15. c. 3. f. 11.*

So, in *replevin* for two oxen, property in a stranger as to one, and taking in another place as to the other. 9 *H. 6.* 39. *Th. D. l. 15. c. 3. f. 16.*

So, in *assumpsit*, upon several counts, a plea in abatement to one of the counts is good, though the writ be entire. *Lut.* 1593.

(I. 6.) And two Defendants shall plead several Pleas in Abatement.

So, one defendant shall plead one plea in abatement, and the other another; as, one executor may plead variance, the other *ne unques executor*. 11 *H. 6.* 42. *Th. D. l. 15. c. 2. f. 6, 9.*

So, in a *quare impedit*, one defendant may plead *no such church*, and the other, *no such bishop*. *Hob.* 249.

(I. 7.) Or, the one shall plead in Abatement, the other to the Action.

And one defendant shall plead in abatement, the other to the action. 17 *Ed. 3.* 24. *b. Th. D. l. 15. c. 2. f. 3.*

As, one tenant shall plead outlawry in one of the demandants, the other shall take the entire tenancy, and plead to the action. 18 *H. 6.* 20. *Th. D. l. 15. c. 2. f. 7.*

In debt upon a bond against two, the one may plead coverture in the plaintiff, the other acknowledge the deed. *Th. D. l. 15. c. 2. f. 13.*

(I. 8.) When a Plea in Abatement, by one Defendant suffices for all.

If one defendant pleads in abatement, matter appearing in the writ, the other need not answer. *Th. D. l. 15. c. 7. f. 2.*

(I. 9.) When not.

But if one of the defendants pleads matter *dehors* not appearing in the writ, the other must answer. 11 *Aff. pl.* 9. *Th. D. l. 15. c. 7. f. 2.*

And if one defendant pleads in abatement, upon which issue is joined, and the other pleads in abatement, upon which it is demurred, and the issue is found for the defendant; the whole writ shall abate upon the verdict, without determining the demurrer. *R. Hob.* 250.

(I. 10.) When a Defendant, who pleads in Abatement, shall plead over to the Action.

If a defendant in an appeal plead in abatement, he shall also plead over to the felony, *not guilty*. *Th. D. l. 15. c. 5. f. 17, 18, &c.*

18, &c. *Co. Ent.* 57. *a.* But that is not necessary; for it is well both ways. *R. Sho.* 47. And therefore, if the defendant plead in abatement without pleading over to the felony, the plaintiff may refuse his plea, or move the court that he plead also to the felony; but if he demurs, it will be well. *R. Carth.* 56.

So if the defendant plead several tenancy, he shall plead over to the action or vouch. *Vide ante* (F. 12.)

So, to an indictment for felony, if the defendant pleads in abatement, or justification, a matter which does not amount to a confession of the felony, he ought to plead over to the felony, *not guilty.* *St. P. C.* 151. *a.* *Adm. Jon.* 346.

So, in an assise upon every plea to the writ, which is triable by the assise, the tenant shall plead over, *nul tort*, &c. *Th. D.* l. 15. c. 5. f. 13.

But where the matter of the plea in abatement is not triable by the recognitors, it is not necessary to plead over to the points of the writ: as, in an assise, if the tenant pleads to the person of the demandant, as outlawry, excommunication, &c. he need not plead over to the assise. *Th. D.* l. 15. c. 5. f. 13. * for the outlawry shall be tried by the record, and the excommunication by the certificate of the bishop.*

So, if he pleads misnomer of the demandant, or jointenancy on the part of the demandant. 28 *Aff. pl.* 36. *Th. D.* l. 15. c. 5. f. 12.

Or, a misnomer of himself. *Th. D.* l. 15. c. 5. f. 7. *Vide* 28 *Aff. pl.* 36.

So, in an appeal of maihem, the defendant must not plead over to the maihem; for it will be a waiver of the plea in abatement. *R. Mo.* 457. *Poph.* 115.

So, in an indictment, where the plea amounts to a confession of the felony; as pardon, release, &c. he shall not plead over *not guilty.* *St. P. C.* 151. *a.*

(I. 11.) A Plea in Abatement shall be strictly exact.

A plea in abatement ought to be with precise and strict exactness. *Lut.* 15.

Ought to be pleaded with certainty. *Co. Lit.* 303. *a.*

Ought to be certain to every intent. 3 *Lev.* 67.

By the *stat.* 4 & 5 *Ann.* 16. No dilatory plea shall be received in any court of record, unless the party by affidavit prove the truth of it, or shew some probable matter to the court inducing the belief, that the fact of such plea is true.

[To a plea to indictment, "that defendant is not named of the parish where he resides," there must be affidavit annexed. *Rex v. Grainger*, *H.* 5 *G.* 3. 3 *B. M.* 1617.]

[The attorney's affidavit to truth of plea in abatement is sufficient. *Barnes* 334.] * for the statute does not require the affidavit of the party himself.*

(I. 12.) How a Plea in Abatement concludes.

If a defendant plead in abatement, matter appearing in the writ, he shall begin his plea, *et petit judicium de brevi*, and shall also conclude in the same manner. *Per 2 J. Mo. 30. Lut. 11. Dal. 33.*

If the action be by original, the plea in abatement begins and concludes by *petit judicium de brevi*. *5 Mod. 132.*

[A plea that the original was taken out before the day of payment in the condition without any introduction, but concluding *et petit judic' quod breve cassetur*, is good. *Pickering v. Simonds, P. 5 G. 2. Fort. 334.*]

If he plead to the writ and declaration, the plea *petit judicium de brevi et narratione*. *5 Mod. 132, 144.*

If the action be by bill, the plea begins and concludes by *petit judicium de billa*. *5 Mod. 144, 132.*

And shall not say, *petit judicium de billa et narratione*; for they are the same. *5 Mod. 144.*

If a plea in abatement concludes, *si respondere debet*, it will be bad. *R. 5 Mod. 146.*

A plea in abatement, which concludes badly, cannot be good. *1 Sal. 297, 8.*

But if the defendant plead matter *dehors*, as non-tenure, jointenancy, &c. he shall conclude his plea by demanding judgment of the writ, and need not say so in the beginning. *Per two J. Mo. 30. Ac. Lut. 11. Dal. 33.*

If he pleads to the jurisdiction, he shall conclude, *judicium si curia vult cognoscere*. *Lat. 178.*

If to the person, *judgment whether he shall be answered*. *Lat. 178.*

And therefore, if the defendant plead, recusant convict, which is in nature of an excommunication, and conclude, *judgment of the bill*, it is bad; for he ought to conclude, *judgment whether he shall be answered*. *Semb. Lat. 178.*

So he may conclude a plea to the jurisdiction, *si respondere debet*. *5 Mod. 146.*

And in a plea of excommunication, *judgment of the writ*, shall not be prayed in the conclusion; but he ought to pray, *quod loquela remaneat sine die*. *R. Lut. 19. Vide ante (E. 7.)*

If the death of one of the plaintiffs or defendants be pleaded, the defendant does not pray *judicium de brevi, et quod breve cassetur*, but *judicium si curia alterius procedere velit*. *R. 3 Lev. 120. Vide ante (H. 33.)*

If the plaintiff replies to a plea in abatement, he ought not to conclude with a demand of damages. *R. 3 Mod. 281. Sho. 155. R. Sho. 255. Cont. Co. Ent. 160.—Acc. if the plaintiff by his replication confesses and avoids the plea; otherwise, if he joins issue upon the plea; for then final judgment is given, if found for the plaintiff. Per Holt.*

(I. 13.) When it shall be waived.

The defendant may waive his plea in abatement, after the plaintiff has replied to it, and plead to the action. 8 Ed. 3. 417. *Th. D. l. 15. c. 8. f. 1.*

But after the parties are at issue upon a plea in abatement, the defendant cannot waive it. *Th. D. l. 15. c. 8. f. 3.*

If a plea in abatement contains matter in bar, though it concludes in abatement, the defendant hath his election to take it in abatement or in bar: as, if he plead, others jointly possessed. *R. 2 Mod. 64.*

(I. 14.) What Judgment shall be upon it.

If the tenant or defendant plead in abatement, and the demandant or plaintiff demur to it, the judgment shall be only, *that the defendant answer over*, if the plea be disallowed. *Th. D. l. 16. c. 11. f. 1, 3. R. 5 Co. 111. a. R. Tel. 112. D. 1 Vent. 22.* (I. 14.) *Respondens Ouster. Vide post. (I. 15.)*

Though it be adjourned to another term, before the plea is determined. *Th. D. l. 16. c. 11. f. 1. R. 22 H. 6. 55. b.*

Though the plea in abatement be pleaded by a wife, received upon the default of her husband. *Th. D. l. 16. c. 11. f. 8.*

Though the demandant or plaintiff tender an issue to the plea in abatement, and the defendant refuses it. *10 H. 4. 6.*

Though the plaintiff and defendant join in demurrer upon it, in the same form as upon a plea in bar; for the plaintiff committed the first fault. *R. 1 Vent. 137. Vide Lut. 197, 1643. 1665.*

So, if a plea to the jurisdiction of the court be disallowed upon a demurrer, the judgment shall only be, *that the tenant or defendant answer over.* *35 H. 6. 4. Th. D. l. 16. c. 11. f. 12.*

So, if a plea in abatement be tried by the certificate of the ordinary against the defendant, it shall only be, *that he answer over.* *Lat. 178.*

So if the defendant prays aid of the king, and demands judgment, *si rege inconsulto*, which is disallowed upon demurrer, it shall only be, *to answer over.* *R. 5 Co. 111. a.*

So if the defendant pleads infancy, and it is tried by inspection, it shall only be, *to answer over.* *1 Lev. 163.*

Upon a demurrer to a plea in abatement, the defendant shall not take exceptions to defects in the declaration. *R. Lut. 1592, 1667. R. 1 Sal. 212. Carth. 172.* Except, where the plea in abatement, is pleadable in bar. *Semb. Lut. 1604.*

If a *respondens ouster* be awarded, notice to the defendant is not necessary; for he shall be supposed in court. *1 Sal. 8.*

But if the plaintiff or demandant join issue upon a plea in abatement, and it be tried against the tenant or defendant, final judgment shall be against him for the delay. *2 Ed. 4. 11. [10.] ment. Th. D. l. 16. c. 11. f. 11. 1 Lev. 163.—Per Wms. Tel. 112. 1 Vent. 22. Ray. 119. Lat. 178. Pr. R. 416.* (I. 15.)

Though

Though the defendant or tenant, who joins issue, be an infant.
R. 1 Lev. 163.

So upon a demurrer to a plea in abatement, after the last continuance, if it be adjudged against the tenant or defendant, final judgment shall be against him. *1 Sid. 252. Vide Al. 66.*

So, if a defendant demur to the count in abatement, final judgment shall be against him; for he ought to plead in abatement, if there was cause. *R. 1 Sal. 220.*

So, if a plea in abatement be plead in bar of the action, final judgment shall be against the defendant or tenant, if the plea be disallowed. *R. 1 Sid. 189, 190. Per Cur.—1 Vent. 136. R. Lut. 42. D. Lat. 178. Vide Lut. 197. R. Mod. Ca. 102. 1 Sal. 3.*

[So, if defendant pleads misnomer in Christian name; replication he was known by the name of *A. L.* as well as *B. L.* issue thereon, and verdict for the plaintiff; judgment must be final. *Eichorn v. Lemaitre, H. 8 G. 3. 2 Wils. 367.*]

So, if his plea be commenced in bar, *actio non*, &c. though it concludes in abatement. *D. 1 Vent. 136. Semb. Cro. El. 203. Semb. Cont. Sho. 4. Vide 1 Lev. 312.*

So, if a plea be to the action of the writ, and concludes to the writ and the plea is disallowed, there shall be a peremptory judgment, though the demandant or plaintiff demurs. *Lat. 178.*

So, if a bad plea be pleaded, and the plaintiff demurs, and the defendant joins in demurrer, as to a plea in bar. *R. Al. 17.*

So, if the defendant avows or makes confession in *replevin*, and then traverses the place, which is matter in abatement, but concludes with praying a return; though he afterwards demurs in abatement, there shall be final judgment. *R. Mod. Ca. 102.*

But if the defendant pleads, *Another who ought to be joined not named*, and in the commencement of the plea *petit judicium de villa, et si actionem poterit habere versus eum solummodo*, &c. there shall be only a *respondeas ouster*; for the defendant does not say, *actio non*, &c. generally, but adds *actionem non*, &c. *versus eum solummodo.* *R. 1 Vent. 136.*

So, if the plea goes in abatement, though the defendant prays judgment *de narratione*, the court may award a *respondeas ouster*; for the defendant cannot assign for error, that which was for his advantage. *1 Sal. 210, 211.*

So if the defendant in *replevin* pleads in abatement, a taking in another place, and traverses the place in the declaration, upon which the plaintiff replies, and traverses the title made *pro re-torn' habend'*. to which the defendant demurs the same term; the *replevin* abates, and shall not be discontinued. *Per three J. Holt. Cont. Carth. 139.*

So, if the plea in abatement be good, and the plaintiff replies as to a plea in bar, it will be a discontinuance. *F, g. 269, 270. Carth. 187.*

If the plea be bad, there shall be a *respondeas ouster.* *F, g. 269, 270.*

(I. 16.) At what Time a Plea in Abatement shall be pleaded.

* Every plea in abatement must be pleaded before the rule for pleading be out, and cannot be pleaded after an imparlance, unless the declaration be delivered so late in term that the defendant is not bound to plead it in that term, or be delivered after term: in both which cases, the defendant may, within the first four days inclusive, of the subsequent term, plead any plea of abatement as of the precedent term, whether a rule be given or not, and Sunday is one of the days. 1 Term Rep. 278.*

And the four days for pleading in abatement are both inclusive. Id. 277. And the plaintiff may sign judgment, if defendant plead in abatement after the four days are expired, whether a rule to plead has been given or not. Id. 689.*

The form of the defence is such, *et prædict'* A. B. *defendit vim et injuriam quando, &c. et damna, et quicquid quod ipse defendere debet, &c.* Co. Lit. 127. b.

By the first part of the defence, the defendant makes himself party to the action, viz. by these words (*defendit vim et injuriam quando, &c.*) By the words, (*et damna,*) he affirms, that the plaintiff is able to sue, and recover damages; and by the third part, (*et quicquid quod ipse defendere debet,*) he affirms the jurisdiction of the court. Co. Lit. 127. b.

Till the defendant has made himself party by the first part of the defence, (*defendit vim et injuriam, &c.*) he cannot plead to the disability of the plaintiff or any other plea. Co. Lit. 127. b.

And therefore, after the first part of the defence, he shall plead to the jurisdiction of the court, or any other plea in abatement.

For, (*defendit vim et injuriam, quando, &c.*) is not a full defence. R. Cont' Sti. 273. R. Cont. Lut. 7. But R. Acc. Hard. 365. and Semb. by many authorities. Lut. 7.

(*Dicit*) without (*venit,*) is sufficient. R. Sal. 543, 544. R. Cont. Carth. 363.

It is sufficient at the day of appearance, when he is in *custodia mar'*—Otherwise, if after another continuance. Skin. 582.

And (*venit*) without more was allowed. Lut. 9. 3 Lev. 405. R. to be good. 3 Lev. 182. R. Cont. 3 Lev. 240. Dub. per Hale, 1 Vent. 222.

Though it was shewn for cause upon a special demurrer. Lut. 9. Semb. Lut. 1594. R. 1 Sal. 217. But the plaintiff might have refused the plea. R. 1 Sal. 217.

Yet, (*venit et defendit vim et injuriam,*) without more, is the sure way. Lut. 9.

But after a full or general defence, the defendant cannot plead to the jurisdiction of the court. 7 W. 3.

Nor to the disability of the person; as villenage, outlawry, &c. Co. Lit. 127. b. Th. D. l. 14. c. 1. f. 4. Lut. 7.

Nor misnomer, or residence in another vill. 19 H. 6. 1. b. Th. D. l. 14. c. 1. f. 3.

Nor, alien born. Semb. Sho. 349.

After

(I. 7.) After an attorney made, the defendant shall not plead misnomer of himself. *Tb. D. l. 14. c. 6. f. 5. F. N. B. 27. a.*
 After attorney made. Nor that there are others of the same name in the same county. *Tb. D. l. 14. c. 6. f. 4.*

For a misnomer must be pleaded in proper person, and not by attorney, unless there be a special warrant of attorney. *Lut. 11.*

So, he shall not plead, after an attorney made, a mistake of the addition. *R. 8 H. 6. 9. b.*

But he shall plead villenage in the plaintiff. *Tb. D. l. 14. c. 6. f. 1.*

So, if a plea of misnomer by attorney be received, and the plaintiff demurs to it, it will be good: for, it is a cause for refusal of the plea, that a general attorney cannot appear for any other than the defendant; but it is no cause for a demurrer to the plea. *R. by all the judges assembled together. M. 11 W. 3. between Creamer and Wicket, (Reported 1 Ld. Ray. 509.)*

(I. 18.) If a declaration be delivered within term, the defendant may plead in abatement at any time within the same term. *Mod. Ca. 175.*
 After four days after declaration.

So, if it be delivered to any one in custody. *Sal. 515.*

If it be delivered after term, or within four days before the end of the term, he may plead in abatement, or to the jurisdiction, within the first four days in the subsequent term. *1 Sal. 367.*

But if it be delivered more than four days before the end of the term, he shall not have any time for pleading in abatement, after the beginning of the next term. *Mod. Ca. 175.*

(I. 19.) After a special imparlance, the defendant may plead to the jurisdiction of the court. *R. Lut. 46.*
 After imparlance, special.

Or any plea in abatement; as, outlawry, &c. *Lut. 6.*

But the imparlance shall not be with a *salvo* to the jurisdiction of the court. *Lut. 46. Semb. Cont. 1 Sal. 1.*

(I. 20.) After general imparlance, defendant cannot plead in abatement without obtaining special imparlance within the four days. *Barnes 224, 334.*
 General.

After a general imparlance the defendant shall plead any plea to the action; as, alien born, profession, outlawry, &c. in bar to the action. *Tb. D. l. 14. c. 2. f. 20, 21, 27.*

Bastardy, in bar to the action. *Tb. D. l. 14. c. 2. f. 21.*

Though the outlawry was after the action commenced. *5 Mod. 11.*

Or, a plea in abatement, which consists of matter *dehors*, and not appearing in the writ, which shews that the writ never was good; as, No such vill. *Vide Tb. D. l. 14. c. 2. f. 16, 25, 29.*

That the vill supposed is a hamlet of D. *Tb. D. l. 14. c. 2. f. 25.*

Two *Dales* and none without an addition. *Tb. D. l. 14. c. 2. f. 16.*

Another

Another action depending for the same cause. *Per Hale*,
1 *Vent.* 236.

Non-tenure. *Th. D. l. 14. c. 2. f. 18, 25. R. Cont.*

3 *Lew.* 55. *Dy.* 210. *b.*

Jointenancy. *R. 2 Rol.* 41. *Cont. Dy.* 210. *b. Acc. Th.*
D. l. 14. c. 2. f. 18, 25.

That the plaintiff or defendant is a knight, earl, &c. *Th.*
D. l. 14. c. 2. f. 18.

Or, covert-baron. *Th. D. l. 14. c. 2. f. 18. 32 H. 6.*
12. [11.] *R. Cont. Lut.* 24.

Or, dead.

Or, deposed. *Vide Th. D. l. 14. c. 2. f. 30.*

After imparlance, one may have a view. *Cont. per Cur.* but
the prothonotaries, and clerks *acc.* *Dy.* 210. *b.*

But, after a general imparlance, the defendant cannot plead
to the jurisdiction of the court: as, *ancient demesne. D. 1 Vent.*
236. *Dub. Cro. Car.* 9. *Vide ante (D. 9.)*

Nor, after an imparlance *salvis exceptionibus tam ad breve quam*
ad narrationem. Adm. Lut. 45. *Hard.* 365.

Nor, after an imparlance *salvis exceptionibus ad jurisdictionem*;
for this amounts to no more than the former. *Lut.* 45.

So he cannot plead privilege after a general imparlance.
R. Lut. 639. *Hard.* 365. 1 *Sal.* 1.

Nor, in disability of the person of the plaintiff; as, alien
born, excommunication. *Semb. Lat.* 179. *Kelw.* 93. *Vide*
Th. D. l. 14. c. 2. f. 25.

Outlawry. *R. Lat.* 179. *Vide Th. D. l. 14. c. 2. f. 21,*
25.

Recusant convict. *Dub.* 2. *Mod. Ca.* 43. *Acc. Ibid.*
381. [*Curven v. Fletcher, P. 8 G. Str.* 520.]

Bastardy to an action by one as heir. *Th. D. l. 14. c. 2.*
f. 21.

Another, who ought to join, not named. *R. 1 Vent.*
136, 184.

Bad addition. *R. Mod. Ca.* 80.

No such person in *rerum naturâ.* 4 *H. 7. 17. Th. D.*
l. 14. c. 2. f. 27.

Nor, in disability of the tenant or defendant.

As, coverture. *R. Lut.* 24.

Misnomer. 5 *Ed.* 4. 78, 103. *b. D. 1 Vent.* 236. *Vide*
Th. D. l. 14. c. 2. f. 24. Misnomer of the plaintiff.

False addition; as, no such vill as is mentioned in the addi-
tion. *Th. D. l. 14. c. 2. f. 17, 25, 29.*

That he is administrator, not executor. *R. 2 Lew.* 190.
Th. D. l. 14. c. 2. f. 21.

That he has the entire tenancy in himself, after a joint im-
parlance. 40 *Ed.* 3. 40. *Th. D. l. 14. c. 2. f. 35.*

Non-tenure, general or special. *R. 3 Lew.* 55. *Dy.* 210.
b. Cont. in marg. ibidem. Acc. per Dyer. Mo. 33.

Nor can he demand oyer of a decd. *Vide in Pleader (P. 2.)*
Th. D. l. 14. c. 2. f. 22.

Or

Or plead in abatement of the writ, matter appearing in it; as variance between the writ and a testament. *Th. D. l. 14. c. 2. f. 22.*

That the action was commenced before the cause of action arose. *2 Lev. 197.*

Or, plead in abatement in trespass, no such vill, or hamlet. *7 Ed. 4. 1. Th. D. l. 14. c. 2. f. 25.*

That there are three villis in *S. R. Tel. 112.*

Yet, if a man pleads after imparlance in abatement, when the plea was not pleadable after imparlance; if the plaintiff does not demur, but replies, the plea shall stand. *Adm. 1 Vent. 236.*

Or, the plaintiff may in his replication alledge the imparlance by way of estoppel. *Lut. 23.*

(I. 21.) After *prece partium*, the defendant has given *judici jurisdictionem, partem facit responibilem, malum breve affirmat, malum processum ratificat.* *Per Wilby, Th. D. l. 14. c. 2. f. 13.*

And therefore, after *prece partium* the defendant shall not plead to the person of the plaintiff, or defendant; as, non-tenure. *Mo. 33. Th. D. l. 14. c. 2. f. 8.* * But if *prece partium* be given before the count, the tenant may plead non-tenure after. *By Herle, P. 7. E. 3. 311. **

Another, who ought to join, not named; as, parcener, jointenant, &c. *Th. D. l. 14. c. 2. f. 5, 10, 14.*

Entire tenancy. *Th. D. l. 14. c. 2. f. 14.*

Several tenancy. *Th. D. l. 14. c. 2. f. 14.*

Coverture of the plaintiff, or defendant. *4 Ed. 3. 115. Th. D. l. 14. c. 2. f. 3.*

Nor, to the writ.

Though it be matter *dehors*; as, No such vill, or hamlet. *Vide Th. D. l. 14. c. 2. f. 1.*

That the land in demand contains a less number of acres.

That another ancestor was last seised. *Th. D. l. 14. c. 2. f. 5.*

That the demandant is seised by disseisin. *Th. D. l. 14. c. 2. f. 32.* * But it is said, that, after *prece partium*, the tenant may plead, to the writ, any thing that arises from the demandant's own shewing. *Th. D. l. 14. c. 2. f. 6.* Unless the disseisin be alledged since the last continuance. *

(I. 22.) After *oyer*, the defendant shall not plead to the person of the plaintiff, or defendant.

As, non-tenure. *Th. D. l. 14. c. 5. f. 1.*

Another executor not named. *22 Ed. 3. 19. b. Th. D. l. 14. c. 5. f. 2.*

(I. 23.) After a plea to the action, the defendant shall not plead in abatement, except, where he pleads it, *after the last continuance.* *Th. D. l. 14. c. 14. 1 Rol. 176.*

Nor after errors assigned. *Th. D. l. 14. c. 15.*

So a writ of privilege shall not be allowed for the defendant. *R. Dal. 35.*

Yet

Yet after issue, outlawry for felony was pleaded, without saying, *after the last continuance.* *Tb. D. l. 14. c. 3. f. 1.*

So in a *precipe quod reddat*, after a plea in bar, if the demandant by his replication claims the land as held of him by the tenant, he may disclaim, though it be only in abatement; for he could not disclaim before; for *prima facie* he shall be intended to be a pignor or disseisor, and no one can disclaim but the tenant, which till the replication he does not appear to be. *11 H. 7. 14.*

But after the last continuance, the defendant shall plead any plea in abatement, by which the writ shall be abated: as, to the person of the plaintiff, &c. *2 Cro. 82. 2 Vent. 58.* (I. 24.)
After the last continuance.

And this, after the last continuance of a demurrer, as well as upon an issue. *R. Hob. 81. Cont. Mo. 871. Vide post. (I. 35.) Semb. Cont. Mod. Ca. 9.*

Puis darrein continuance must be verified, or it will be set aside. *Martin v. Wywill, H. 8 G. Str. 492.*

And a plea, *after the last continuance*, was admitted a week after the term commenced. *2 Fon. 129.*

So, if at *nisi prius*, the jury *remanet pro defectu juratorum*, there may be a plea, *after the last continuance*, to the day in bank, though it was not tendered at the *nisi prius.* *Bro. Contin. 30.*

So the defendant *after the last continuance*, may plead entry into parcel. *R. 2 Cro. 261.*

If a plea in abatement, *after the last continuance*, be bad, final judgment shall be against the defendant. *Vide ante (I. 15.)*

So a plea, after the last continuance, shall be amended. *R. 2 Cro. 262.*

So the defendant shall plead in bar, *after the last continuance.* *Adm. Co. Ent. 518. a. Clift 630. Bro. R. 187.*

And a plea, *after the last continuance*, shall conclude to the action, not to the inquest. *R. Cro. El. 49. Lut. 1143.*

[It cannot be rejected by the court, if it be verified by affidavit; and they cannot determine whether it is a good plea or not, but on demurrer. *Paris v. Salkeld, H. 2 G. 3. 2 Wilf. 137.*

And after such plea at *nisi prius*, the court shall not proceed to trial. *1 Bul. 92.*

And the plaintiff shall not reply at *nisi prius*, but in bank. *1 Bul. 92. Agr. 10 H. 7. 21. b. 2 Cro. 262.*

So if the plaintiff demurs at *nisi prius* to a plea, *after the last continuance*, it shall be adjourned, and not determined there. *Hard. 112. 10 H. 7. 21. b. R. 2 Mod. 307.*

And the justices may receive such plea at *nisi prius.* *R. 2 Rol. 630. l. 30.*

But, if the plea appears for delay, they may refuse it; for it is in their discretion. *Per Tanfield, 2 Rol. 630. l. 35. Semb. 2 Cro. 261.*

But he shall not plead a plea, *after the last continuance*, after a writ of inquiry awarded; for he has no day in court. *Bro. Contin. 61, 83.*

Nor, after a verdict at *nisi prius.* *Vide post. (I. 34.)*

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H

Nor,

Yet

Nor, after a demurrer. *Semb. Mod. Ca. 9.*

So a plea, *after the last continuance*, which says, *ad hunc diem*, viz. *die Jovis prox. post Octab. Trin. &c.* when the *quarto die post* was *die Mercurii*, is bad; though the proceeding was adjourned *ad die Mercurii* to the next day. *R. 2 Vent. 58.*

So, if it says, *post ult. contin', et ante hunc diem.* *Semb. Lut. 1142.*

So a fact pleaded, *after the last continuance, et ante hunc diem*, viz. 29 *Oct.* where the day of the return was 27 *Oct.* is bad, though the *quarto die post* was afterwards; for *ad hunc diem* does not relate to the day of grace, but to the day of the return. *R. Co. Ent. 517. d.*

Yet, after a plea in bar, the defendant shall have only one plea, *after the last continuance*, unless it be a matter apparent to the justices, or for the advantage of the king. *Th. D. l. 14. c. 3. f. 12. 16 H. 7. 11. b. 12. b.*

And a plea, *after the last continuance*, waives the plea in bar, and there shall be no benefit of it. *1 Sal. 178.*

So, it ought to begin with a *relativa verifikatione* of the plea. *Co. Ent. 518. a.*

If any thing happens, which abates the writ, before any plea pleaded, the defendant may shew the day when that was done, and plead it without saying, *after the last continuance.* *Per Litt. 15 Ed. 4. 5. Th. D. l. 14. c. 3. f. 10.*

So, if any thing happens pending the writ, and before issue joined, which goes in bar, or proves the writ abated, and not abateable only, it may be pleaded without saying, *after the last continuance.* *Semb. Lut. 1178.*

Though there be a continuance after the thing happened. *Lut. 1178.*

Yet in such case it ought to be shewn, that it happened pending the writ. *Semb. Lut. 1178.*

So, outlawry, after the declaration delivered, and before plea, may be pleaded in bar, without saying, *after the last continuance.* *R. 5 Mod. 11. 1 Sal. 178.*

But, a plea of any thing which happens after issue joined, must say, *after the last continuance.* *Lut. 1178.*

So, on an imparlance to next term, and plaintiff gives a release to defendant in the mean time, he may plead the release in bar as an original plea, as it is before issue, but after issue joined, it must be pleaded *puis darrein continuance.* *Price v. Kendrick. Fort. 338.*

(l. 25.)
After a
view.

After a view the tenant or defendant shall not plead to the jurisdiction of the court. *Th. D. l. 14. c. 4.*

Nor, to the person of the plaintiff. *Th. D. l. 14. c. 4.*

Nor, matter apparent in the writ.

Nor, to the form of the writ; as, no such vill. *Th. D. l. 14. c. 4. f. 3.*

That *Dale* where the land is supposed, is not a vill nor a hamlet. *Th. D. l. 14. c. 4. f. 3.*

That *Dale* is a hamlet of *Sala*. *Th. D. l. 14. c. 4. f. 13.*

Misnomer of the vill, or manor. *Th. D. l. 14. c. 4. f. 6, 30.*

Mistake of descent. *Th. D. l. 14. c. 4. f. 10, 15. Semb.*

3 *Lev. 219.*

Misnomer of one mentioned in the descent. *Th. D. l. 14. c. 4. f. 21, 33.*

Darrein seisin. Th. D. l. 14. c. 4. f. 16.

Nor, any thing that does not arise upon the view. *Semb.*

3 *Lev. 219.*

And it is not necessary, that the demandant plead the view : for the writ of view being returned of record in the same court, the judges will take notice of it without pleading. *R. 3 Lev. 219.*

And a plea, which the tenant or defendant shall not have after a view, he shall not have after demand of a view. *Th. D. l. 14. c. 4. f. 37.*

But, a matter which appears by the view, shall be pleaded after the view, though it be to the jurisdiction of the court, or to the person of the plaintiff or defendant, &c. As, *ancient demesne. Th. D. l. 14. c. 4. f. 36. 3 Lev. 405.*

Non-tenure. *Semb. by the stat. W. 2. 13 Ed. 1. 48.*

That the land lies in another county. *Th. D. l. 14. c. 4. f. 38.*

Or, in another vill. *Th. D. l. 14. c. 4. f. 3, 6, 12.*

That the same land is twice demanded. *7 H. 6. 39. [36.] Th. D. l. 14. c. 4. f. 38.*

So, a thing which goes to the matter, not only to the form of the writ ; as, a mistake of title. *Th. D. l. 14. c. 4. f. 22, 34.*

Mistake of the action. *Th. D. l. 14. c. 4. f. 11, 17, 18.*

3 *Lev. 219.*

Non-summmons of one tenant. *Th. D. l. 14. c. 4. f. 23.*

If the tenant or defendant plead after a view, he shall say, *tenementa in visu posita*, &c. *3 Lev. 405.*

But to say, *in visu posita*, when there cannot be a view, as in ejectment, &c. is ill. *R. 3 Lev. 405.*

After law of non-summmons, or day given to wage his law, (I. 26.) the tenant shall not be received to plead any thing : nor can he After law say, that the demandant has taken husband, after the day for wa- of non-summ-
ger of law. *Th. D. l. 14. c. 16. f. 19. mons.*

So in an action against several, after wager of law one cannot take the entire tenancy upon himself. *Th. D. l. 14. c. 16. f. 25.*

Nor say that one of the tenants is dead. *Th. D. l. 14. c. 16. f. 8.*

Nor plead non-tenure ; for he admits himself tenant by waging his law of non-summmons. *R. 1 Leo. 92.*

But a man may plead after default ; and therefore, at the re- (I. 27.) turn of the *petit cope*, the tenant shall plead, that the demandant After de- is professed, without saving his default. *39 Ed. 3. 20. [16.] fault.*
Vide Th. D. l. 14. c. 16. f. 21.

H 2

Or,

Or, that the demandant is outlawed since the last continuance. *Tb. D. l. 14. c. 16. f. 31.*

That his estate was only for the life of *A.* who is dead, and that he in the reversion has entered. *Tb. D. l. 14. c. 16. f. 30.*

That the demandant has disseised him after default. *Tb. D. l. 14. c. 16. f. 13.*

So, the tenant, without saving his default, may plead something, which shews the writ to be abated; as, death. *Co. Lit. 303. b.*

And something, which is apparent in the writ. *Co. Lit. 303. b.*

And if the tenant saves his default, he may take the entire tenancy upon him. *18 Ed. 3. 27. b. Vide Tb. D. l. 14. c. 16. f. 14. 20.*

Or plead that the tenements are seised into the hands of the king. *Tb. D. l. 14. c. 16. f. 18.*

So, at the return of the *grand cape*, the tenant shall plead, without saving his default, villenage in himself: for he had not before appeared to affirm the tenancy in his person. *6 Ed. 3. 254. Tb. D. l. 14. c. 16. f. 7.*

That the demandant had disseised him after default, and is still tenant. *Tb. D. l. 14. c. 16. f. 9.*

In dower, that the demandant after default had received such land for her dower. *Tb. D. l. 14. c. 16. f. 11.*

Non-tenure. *Tb. D. l. 14. c. 16. f. 27.*

(1. 28.)
After
voucher.

After voucher, the tenant shall not plead to the form of the writ. *Tb. D. l. 13. c. 10. f. 1. l. 14. c. 7. f. 2. 5 Ed. 3. 223.*

Nor, variance between the writ, and specialty. *Tb. D. l. 14. c. 7. f. 2. 6 Ed. 3. 265.*

But, after voucher he shall plead, that the demandant has disseised him pending the writ. *4 Ed. 3. 148. Tb. D. l. 14. c. 7. f. 1.*

That the demandant has taken husband since the last continuance. *22 Ed. 3. 1. b. Tb. D. l. 14. c. 7. f. 5.*

That the demandant is outlawed. *21 Ed. 4. 64. Tb. D. l. 14. c. 7. f. 7.*

A recovery pending the writ. *Semb. Tb. D. l. 14. c. 7. f. 8, 9.*

(1. 29.)
After aide
prie.

So, after *aide prie*, the tenant shall not plead a variance between the plaint, and specialty. *29 Aff. pl. 55. Tb. D. l. 14. c. 8. f. 1.*

So, after *aide prie* of a parcener, he shall not plead, another parcener not named. *9 H. 6. 5. Tb. D. l. 14. c. 8. f. 5.*

But, after *aide prie*, the tenant shall plead matter apparent in the writ in abatement, as *amicus curia*. *Tb. D. l. 14. c. 8. f. 4. 11 H. 4. 67.*

And the tenant and *prie in aide* may join to plead a matter apparent, as *amicus curia*, but not otherwise. *Tb. D. l. 14. c. 8. f. 6.*

So,

So, the tenant and *prie in aide* may plead *darrein seisin* in abatement. 10 *Ed.* 3. 527. *Tb. D. l.* 14. c. 8. f. 6.

Or, other matter in deed. 11 *H.* 4. 28. *Tb. D. l.* 14. c. 8. f. 6.

So in a *scire facias* upon a fine, after *aide prie* the tenant shall plead, *auterfoits execute.* *Tb. D. l.* 14. c. 8. f. 2.

After garnishment in *delinque*, and a *scire facias* awarded, the (1. 30.) defendant shall not plead, that the demandant was outlawed after the last continuance. 11 *Ed.* 4. 14. [11.] *Tb. D. l.* 14. c. 9. After garnishment.

But the garnishee shall plead to the person of the plaintiff, that he is excommunicated. 3 *H.* 6. 40. *Tb. D. l.* 13. c. 12.

f. 3. That another ought to join not named. *Tb. D. l.* 13. c. 12.

f. 1. That the bailment was to the defendant, and another not named.

3 *H.* 4. 5. [7 b.] *Tb. D. l.* 13. c. 12. f. 2.

That the plaintiff is outlawed. 11 *Ed.* 4. 14. [11.] *Tb. D. l.* 13. c. 12. f. 7.

So he shall plead, false *Latin* in the original, or other matter apparent, as *amicus curie.* 9 *H.* 6. 39. *Tb. D. l.* 13. c. 12. f. 5.

After receipt the tenant by receipt shall plead to the person of (1. 31.) the demandant; as coverture. 48 *Ed.* 3. 25. *Tb. D. l.* 13. After receipt.

f. 11. f. 25. Misnomer of himself. *Tb. D. l.* 13. c. 11. f. 10, 35, 38.

f. 14. c. 17. f. 4.

But, he shall not plead a matter that happened after the receipt, without saying, after the last continuance. 49 *Ed.* 3. 21. *Tb. D. l.* 13. c. 11. f. 26.

When the parol demurs for non-age, after re-summmons at his (1. 32.) full age, the tenant shall plead non-tenure. *Tb. D. l.* 14. c. 10. After re-summmons.

2. So after a pardon of outlawry, the defendant shall plead in abatement, in the same manner as before the outlawry. *Tb. D. l.* 14. c. 11.

So, after a *superfedeas* purchased by the friends of the defendant in chancery. 10 *H.* 7. 13. b. *Tb. D. l.* 14. c. 11. f. 4.

But if the *superfedeas* was purchased by the defendant himself, is an estoppel to him to plead to the writ, unless he makes a special entry upon the roll, saving at other times his exception to the writ. *Tb. D. l.* 14. c. 11. f. 4. 10 *H.* 7. 13. b.

And therefore, if after *exigent* awarded, the defendant appears *gratis*, and sues a *superfedeas*, he cannot plead to the writ for a fault in the addition. *Semb. Dy.* 88. b.

After removal of a plaint in *replevin* out of the county, the defendant shall plead in B. to the person of the plaintiff; as, that (1. 33.) he is his villein. *Tb. D. l.* 14. c. 13. 5 *Ed.* 3. 206. After removal of the record.

Misnomer in a name of dignity. *Tb. D. l.* 14. c. 13. (1. 34.)

(I. 34.) A Plea in Abatement shall not be pleaded.

(I. 34.)
After ver-
dict.

But after a verdict, matter which abates the writ shall not be pleaded in abatement; for the defendant has no day in court. *Bend. pl. 74. Th. D. l. 14. c. 18.*

Though the verdict was taken by default. *Brq. Contin. 38.*

Though it be a matter that happened after the day of *nisi prius*, and before the day in bank. *Bro. Contin. 13, 17.*

As after verdict, the death of one of the defendants does not hurt, because the party had no day to plead it. *R. Cro. El. 202. 4 Leo. 15. Vide ante (H. 35.)*

So, a release after verdict before the day in bank cannot be pleaded; and the defendant has no remedy but by *audita querela*. *R. 2 Cro. 646.*

Nor marriage of the plaintiff, being a *feme-sele*, after verdict, before the day in bank. *R. Cro. Car. 232.*

So, if after a verdict the plaintiff suggests, that one of the defendants died since the verdict, and the other defendants admit it, and upon this there is judgment against them; it will not be error, though the death was really before the verdict; for it cannot be alledged contrary to the record. *R. Jon. 411.*

So, in trespass, &c. where the death of one of the defendants does not abate the writ, if one defendant dies after issue joined, and a *venire* and *distingas* awarded to try the issue, if the plaintiff suggests his death, and the judgment and verdict be only against the survivor; it is not error. *R. Jon. 367.*

So, if a general pardon be after a special verdict and the continuances upon it: and before judgment it cannot be pleaded. *R. Hard. 191.*

(I. 35.)
Nor after
demurrer.

So, it shall not be pleaded after demurrer: as that admission is repealed, and granted to another. *R. Mod. 871. Vide ante (I. 24.)*

(I. 36.)
Nor after
the first
judgment.

So, a writ does not abate after the first judgment, and before a writ of inquiry; as if the defendant dies after a writ of inquiry awarded and before the return of it. *Per two J. 1 Leo. 263.*

So, if the defendant die after judgment *quod computet*, and account made up, before final judgment. *1 Leo. 263. Cont. Br. Jud. 17.*

Or, if the plaintiff die after judgment *quod computet*, before final judgment. *Cont. Br. Jud. 17.*

So matter in abatement cannot be assigned for error: as, if the defendant be called *miles et baronetus*, where he is no baronet. *R. 2 Rol. 50.*

(K.) What Matter must be pleaded in Abatement.

WHEN a writ is only abateable, it must be pleaded for if it cannot be pleaded, the writ does not abate.

As, if the plaintiff enter into the land after verdict in an assise, and before the day in bank, the writ does not abate; for it cannot be pleaded. *R. per tot' Cur. 1 Bul. 5, &c. R. 2 Brownl. 231. R. Cro. El. 767.*

So, if a woman, plaintiff in an assise, takes husband after verdict, and before judgment. *1 Bul. 5. 1 Sid. 143.*—for by the taking of the husband the writ is only abateable. *1 Leo. 169.*

So, if another, who ought to be joined, is omitted, it must be pleaded; as in a *quare impedit* against the incumbent alone. *2 Cro. 651.*

So, if trespass be by one jointenant alone, the writ does not abate, without plea; though it be found by the inquest. *R. Mo. 466. R. Cro. El. 554.*

So, if debt be against an executor upon a simple contract, the writ does not abate, unless it be pleaded. *Cont. R. Cro. El. 121. R. Acc. Vaugh. 94, 95.*

So a matter may be pleaded in abatement, though it be matter in bar. *1 Mod. 214.*

(L.) What need not.

{L. 1.) As, if the Writ appears false by the Confession of the Plaintiff, or Demandant.

BUT when a demandant or plaintiff falsifies his writ by his own confession, or by his own shewing, it abates without plea: as, in an assise against several, one pleads a release from the plaintiff; if he acknowledges it, his writ shall abate. *11 Aff. pl. 9. Tb. D. l. 16. c. 4. f. 6.*

In trespass, the defendant justifies by a warrant for the king's tax; the plaintiff replies, that the place where, &c. was within sanctuary. And for this his writ abated; for he acknowledges the taking by warrant, and therefore ought to have *replevin*, and not trespass. *Tb. D. l. 16. c. 4. f. 11.*

{L. 2.) Or, by his shewing.

So, in error to reverse a recovery of the manor of *D.* if the plaintiff shews, that only a moiety was recovered, his writ abates. *Di. 3 Co. 1. b.*

If an executor shews, that there is another executor alive not named. *R. 1 Rol. 176.*

If the plaintiff who lays his action in *Middlesex*, shews, that the defendant appeared to a writ directed to the sheriff of *Hampshire*. *R. Lut. 34.*

{L. 3.) So if it appears false by the Record.

So, if the writ appears to the court to be false by the record itself, the court *ex officio*, or at the request of the defendant, as *amicus*.

amicus curiæ, shall abate the writ: as, if it appears to be variant from the register. *Hob.* 280, 281.

Or, to have false *Latin*. *Hob.* 281.

(L. 4.) Or, by the Evidence.

So, if the writ appears to be false by the evidence, it abates without plea: as, in an assise upon a disseisin to two, if by the evidence it appears, that one only was disseised, and not the other, the writ shall abate. *Tb. D. l. 16. c. 5. f. 1. R. Bend. pl. 89.*

1 *Ed.* 3. 5.

So, in an assise by husband and wife, upon a disseisin to the wife, if the disseisin be found to have been made to both. *Tb. D. l. 16. c. 5. f. 1.*

So, in assise if it be found, that the tenements are in another will. *Tb. D. l. 16. c. 5. f. 3.*

So, in debt upon a lease for years if it appears to be a variant lease. *R. Bend. pl. 223.*

(L. 5.) If the Writ be absolutely abated.

So, if the writ be absolutely abated; as, if the plaintiff die after verdict and before judgment. 1 *Bul.* 5. *R. Cro. Car.* 509. 1 *Sid.* 143.

So, if one of the plaintiffs die, when the death of one abates the writ.

If a woman demandant takes husband. 2 *Brownl.* 235.

And, upon *affidavit* of the death, judgment shall be stayed, upon motion. 1 *Sid.* 131.

Or, it may be assigned for error, if judgment be entered. *R. Cro. Car.* 509. 1 *Sid.* 143.

But, by *stat.* 17 *Car.* 2. 8. in actions personal, real, or mixed, the death of either party between verdict and judgment shall not be error, if judgment be entered in two terms after verdict.

And the judgment entered after the death, according to the statute, shall relate in all respects to the life of the testator. *R.* 1 *Lev.* 278. *Vide Ray.* 210.

(M.) When the whole Writ abates.

WHEN, by a plea in abatement the whole action is defeated, the whole writ shall abate; as, if the writ be abated for default of form of the register. *Per Herle*, 6 *Ed.* 3. 278. 3 *Co.* 159. b. *Tb. D. l. 16. c. 10. f. 2.*

Or, the plaintiff or defendant dies.

Or, be misnamed.

So, if one of the defendants die, be misnamed, &c. 32 *H.* 6. 2. a.

So, when it appears by the confession or shewing of the plaintiff or demandant himself, that he has no cause of action for part, the whole writ shall abate: as, in a *formedon*; where it appears by the

the confession of the demandant that he has no right to a third part during the life of *F.* the whole writ shall abate. *Hob.* 279.

So, in an action upon the case upon several promises, where it appears, that one of the promises was before any cause of action. *Semb. Lut.* 1592.

So, in a *formedon* for a moiety of a manor, if it appears by the replication, that the plaintiff has a right only to a moiety of a moiety, his writ abates. *Sav.* 86.

So, when the plaintiff may have other writs severally for two things in another manner, the writ shall abate for the whole: as, in an account against the defendant as receiver, and the plaintiff declares against him as receiver, and for an other matter, as bailiff; the writ shall abate for the whole; for he might have several writs for the same matters, the one as receiver, the other as bailiff. *R.* 4 *Leo.* 39. *D.* 1 *Sand.* 285.

But, it shall be aided after issue and verdict. *R.* 4 *Leo.* 39.

So, if a writ of entry in nature of an assise be for two acres, and it appears by the shewing of the demandant, that he ought to have entry in the *per*, or other action for the one acre; the writ shall abate for the whole. 11 *Co.* 46. *a.*

(N.) When only a Part.

BUT, if the writ be for two things, and he can have no action at all for one of them, the writ shall abate only for that parcel. 1 *Sand.* 285. 11 *Co.* 5. *b.*

As, if part be within the jurisdiction, and part not; as, if part be frankfee, part ancient demesne. *Qu. Th. D.* l. 16. *c.* 10. *f.* 4.

If trespass be for breaking a close, and taking away lambs, which lambs are tithes, the writ abates only for them. *Th. D.* l. 16. *c.* 10. *f.* 36.

If executors sue trespass for breaking the testator's close, and carrying away money *in vita testatoris*, though it does not lie for the *clausum fregit*. 11 *Co.* 45. *b.*

If *detinue* of charters be by a husband alone, where one of the charters concerns the inheritance of his wife, and the other his own inheritance; for no action lies by the husband alone for the charter of the inheritance of his wife. 11 *Co.* 45. *b.*

If there be a *formedon* for land, and an advowson, though it appear he cannot have the action for the advowson, the writ stands good for the land. 11 *Co.* 45. *b.*

So, if a writ abates by plea of a matter of fact by one, it does not abate as to others. 8 *Co.* 159. *b.*

As, misnomer of one defendant abates the writ only as to him. 27 *H.* 8. 26. *b.* 8 *Co.* 159. *b.*

So, the death of one defendant pending the writ. 27 *H.* 8. 26. *b.*

(O.) When

(O.) When a Writ abateable shall be made good by the Act of the Tenant or Defendant.

IF a writ be abateable for want of a good and proper tenant, if the tenant purchases pending the writ, that makes the writ good. *Tb. D. l. 16. c. 3. f. 1, 2.*

So, if a writ be brought against him in reversion in the life of the tenant for life, who surrenders to him in reversion; hereby the writ is good. *1 H. 6. 1. though he dies after the surrender. Tb. D. l. 16. c. 3. f. 9.*

So, if the tenant, who had nothing in the land at the day of the writ purchased, recovers against a stranger, and has execution pending the writ. *Tb. D. l. 16. c. 3. f. 3.*

Otherwise, if the tenant comes to the freehold pending the writ, by the act of God; as, by descent, &c. *Tb. D. l. 16. c. 3. f. 3, 7.*

Or, if he purchases, pending the writ, jointly with another. *Tb. D. l. 16. c. 3. f. 5.*

Or, tenant for life dies, by which the defendant in reversion becomes tenant. *Tb. D. l. 16. c. 3. f. 6.*

So, if a man sued by a false name of dignity puts in bail by that name, he shall afterwards be estopped to plead this in abatement. *Adm. 1 Vent. 154.*

If a tenant in common sues for a moiety of tithes, and the defendant pleads *nil debet*, he is estopped afterwards to say, that he has the tithes in common with another not named. *Per Twissden, 1 Sid. 49.*

So, if a writ be defective for want of form only, it may be aided by the voluntary appearance of the defendant. *Per Holt, C. J.*

As misnomer; bad, or no addition, &c. *Per Keeling, 1 Sid. 247.*

Want of a *teste*, or fifteen days between the *teste* and return. *R. 1 Sal. 63.*

Otherwise, if the appearance of the defendant be by coercion. *Per Holt.*

So the appearance of the defendant does not aid, where he takes notice of the defect by challenge, or demurrer, though he pleads over. *1 Sal. 59.*

(P.) Writ by Journeys Accounts.

IF a writ abates without the default of the demandant or plaintiff, he may have a new writ by *journeys accounts*, viz. *Per dietas computat' recenter tulit aliud breve.* *6 Co. 10. b.*

As if it abates for variance, false *Latin*, or other default of form. *6 Co. 10. a. 2 H. 4. 21. a.*

Or for the default of the clerks, sheriff, &c. *6 Co. 10. a.*

As, for non-summons; for that is the fault of the sheriff. *6 Co. 10. a.*

So, if a writ abates for non-tenure, or jointenancy only of parcel; for the demandant has a good tenant, and cannot know in whom the estate of every parcel is. *6 Co. 10. a.*

Or,

Or, for non-tenure of the whole by one defendant in partition. *R.* 2 *Cro.* 218.

So, if a writ abates by death. 2 *Brownl.* 158.

By the death of the king. *Dal.* 3.

By the death of one of the plaintiffs or demandants. 6 *Co.* 10. *b.*

Or, by the death of one of the tenants or defendants. 6 *Co.* 10. *b.*

Or, by the death of the tenant or defendant, when there is only one defendant. *D. Cont. Lut.* 260. *Semb. Acc.* 10 *Ed.* 3. 16. *a.* 8 *H.* 5. 6. *a.* *F. N. B.* 32. *c.* 1 *Leo.* 22.

Or, by the determination of the power of the plaintiff; as if there be an executor, till the son comes of age, the son may have the writ by *journeys accounts*. *R.* 1 *Sal.* 393.

So, if the demandant has judgment by default in a *formedon*, which is reversed in *disceit* for a fault of the summons, the demandant may have a writ by *journeys accounts*. *R.* 6 *Co.* 10.

So, if a *quare impedit*, abates by the death of the incumbent, and the disturber presents another; the plaintiff shall have assise of *darrein presentment* by *journeys accounts* for the first disturbance. *F. N. B.* 32. *c.* 1. *Brownl.* 160.

The writ by *journeys accounts* must be in the same court, where the first writ was. 6 *Co.* 10. *b.*

Must be of the same quantity; and, if it can, between the same parties. 6 *Co.* 10. *b.* *Lut.* 296, 297.

And it will be a continuance of the first writ; for the plaintiff or demandant shall have the costs of the first writ. 6 *Co.* 10. *b.* *Vide Costs* (A. 1.)

And if the demandant pleads *plene administravit*, he shall say, at the day of the first writ. 6 *Co.* 10. *b.*

If the statute of limitations incurs after the first, before the second writ, it will be no bar. *R.* *Dal.* 3.

The writ by *journeys accounts* is always alledged by way of counterplea to the voucher. 6 *Co.* 10. *b.*

Or, by way of replication to oust the plea, which accrues upon matter after the date of the first writ. 6 *Co.* 10. *b.*

And, ought to put in certain the time of the abatement of the first writ, whereby the court may adjudge, the other was purchased *recenter et incontinenti*, viz. with all diligence. 6 *Co.* 11. *a.*

What shall be a reasonable time for the purchase of a new writ, shall be in the discretion of the justices. 6 *Co.* 11. *a.*

Fifteen days have been allowed reasonable. 6 *Co.* 11. *a.*

So, half a year. *Semb.* 6 *Ed.* 3. 32. *b.*

So, thirty days. 1 *Sal.* 393.

And it is sufficient, if it be freshly purchased after notice of the death of the defendant, though it be two years after his death. 10 *Ed.* 3. 16. *b.* *Dub. Lut.* 269, 297.

But, a writ by *journeys accounts* shall never be, where the first abates by the default of the plaintiff or demandant. 6 *Co.* 10. *a.*

As, for non-tenure, or jointenancy, of the whole. 6 *Co.* 10. *a.*

Because the plaintiff or tenant was a knight. 6 *Co.* 10. *b.*

Th. D. l. 16. *c.* 8. *f.* 38. *R.* 32 *H.* 6. 24. *a.*

Or, if the plaintiff be non-suited. *Th. D. l.* 16. *c.* 8. *f.* 36.

A B A T E M E N T.

Nor, where the first writ abates by the death of a *sole* plaintiff or demandant. 6 Co. 10. b.

Though it be in a *quare impedit*, in which the death is peremptory, if it be after the six months. 6 Co. 10. b.

As, if an administrator *durante minori etate* of *A.* be plaintiff; *A.* shall not have a writ by *journeys accounts*. 1 Sal. 393.

Or, there be an executor upon condition, and then *A.*; upon breach of the condition, *A.* shall not have it. 1 Sal. 393.

Nor, where the first writ was not served and returned upon record. 6 Co. 10. b.

Nor, where the first writ was neglected to be prosecuted for a long time before the abatement. *Semb. Lut.* 296.

A judicial writ shall never be by *journeys accounts*; for that does not abate for form. 6 Co. 10. a.

If a writ be prosecuted by *journeys accounts*, this revives the original only, but not the *essoines*, or other proceedings upon it. *R. Lit.* 164.

When a Writ shall be amended.

Vide in Amendment, (D. 1, &c.—S.—2 C. 3, 4.)

Pleas in Abatement in various Actions.

To a writ of appeal. *Vide Appeal*, (G. 3.)

To an assise. *Vide Assise*, (B. 12.—C. 3.—D.—E.—G. 2.)

In dower. *Vide Pleader*, (2 Y. 4.)

In an action against an executor, or administrator. *Vide Pleader*, (2 D. 4. &c. 12.)

In *replevin*. *Vide Pleader*, (3 K. 11.)

To a *scire facias* upon a judgment. *Vide Pleader*, (3 L. 11.)

By a vouchee. *Vide Voucher*, (F. 1.)

In waste. *Vide Pleader*, (3 O. 10.)

Abatement by Legatees.

Vide Chancery, (3 Y. 18, 19.)

A B B O T.

Vide in Ecclesiastical Persons, (B. 2, &c.)

A B E T T O R.

Vide in Justices, (T. 1, &c.)

A B E Y.

(A.) When Land shall be in Abeyance.

(A. 1.) The Fee and Freehold.

WHEN the fee or freehold of the land is not vested in any one, but stands solely in consideration of law, it is said to be in abeyance, or *in nubibus*. *Co. Lit.* 342. b.

As, if the parson of a church die, the fee of the glebe or rectory, and also the freehold is in abeyance. *Co. Lit.* 342. b.

So, when a bishop, abbot, dean, archdeacon, or prebendary dies. *Co. Lit.* 342. b. *Hob.* 338.

Or, any other sole corporation, presentative, elective, or donative. *Co. Lit.* 342. b. *Vide Hob.* 338.

So, if by act of parliament the queen renounces an estate, and by the same act, it is not vested in any other person, it remains in abeyance, *per Dyer*; but *per West*. The fee remains in the queen. *R. Dal.* 42.

(A. 2.) The Fee.

So, when a parson or vicar is admitted, instituted, and inducted to a church, the fee-simple is not in him, but in abeyance: *Co. Lit.* 341. a. 342.

So, if a lease be to *A.* for life, remainder to the right heirs of *B.* the fee is in abeyance 'till the death of *B.* *Co. Lit.* 342. b.

(A. 3.) The Freehold.

So, if tenant *per auter vie* dies, the freehold is in abeyance 'till an occupant enters. *Co. Lit.* 342. b. * *Vide Estates F.* *

But a freehold shall not be in abeyance, except in the case of a parson, &c. who dies. *D. 2 Rol.* 502. *Hob.* 388. *Dav.* 34. a.

Or, in the case of a remainder after an estate of freehold. *Hob.* 338.

So, the law does not admit estates to be in abeyance, except in cases of necessity. *Hob.* 338. *2 Rol.* 506.

And therefore, the *stat. 27 H. 8. 10.* does not execute uses in abeyance. *2 Rol.* 335.

And a freehold cannot be in abeyance by the act of the party; for if a man makes a lease for years, remainder to the right heirs of *A.* who is alive, the remainder is void. *Hob.* 153.

[If the *habendum* in a lease for lives, is from the day of the date, the lease is void, for it is a freehold to commence *in futuro*. *Denn v. Fearnside, M. 21 G. 2. 1 Wils.* 176.]

[But if in the lease there is a power to lessor's attorney to take possession and deliver *seisin*, which is accordingly done, it is good, * for till *seisin* delivered, the freehold shall be considered as still continuing in the lessor. *Freeman v. West, T. 3 G. 3. 3 Wils.* 165.] *

ABILITY.

A B I L I T Y.

- Ability, to purchase. *Vide in Capacity*, (A. 1, 2.—B. 1, &c.)
 ——— to grant. *Vide in Capacity*, (C.—D. 1, &c.)—*Grant*.
 ——— to sue, and be sued. *Vide Abion*, (B. 1, &c.—C. 1, &c.)
 ——— to devise and take by devise. *Vide Devise*, (G.—H. 1, &c.—I.—K.)
 ——— to marry. *Vide Baron and Feme.* (B. 2, &c.)

A B J U R A T I O N.

(A.) Abjuration, what.

ABJURATION is an oath which a man or woman take, when they have committed felony, and fly to the church or church-yard for safeguard of their lives, choosing exile rather than to be tried for the felony. *Stamf. P. C. 116. b. (a)*

(B.) The Original of it.

ABJURATION was the law of *St. Edward.* *St. P. C. 116.*

(C. 1.) In what Offences it shall be.

THE coroner shall take the abjuration of him who acknowledges a felony in the same or another county. By the *stat. 22 H. 8. 14. and 32 H. 8. 12.* *H. P. C. 172.*

And such abjuration is not traversable. *H. P. C. 171.*

A man cannot abjure in high treason; for the coroner cannot take his confession. *St. P. C. 116. b.*

Nor in petit treason. *St. P. C. 116. b. 117. a.*

Though the coroner has a commission from the king to do it. *St. P. C. 116. b.*

Nor can he abjure for felony, if the coroner has information that he is charged with high or petit treason. *St. P. C. 116. b.*

Nor can he abjure, when he is condemned for the robbery of a church. *St. P. C. 117. a.*

Or, if he escapes in his passage to execution after a judgment for felony. *St. P. C. 117. a.*

(a) A person accused of any crime (except high treason, petty treason, and sacrilege) for which life or member was to be lost, might, before he was attainted, have fled to any church or churchyard, and within forty days after, gone in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and then abjured the realm, that is, taken the oath of abjuration, which was to depart the realm for ever, at the time and place appointed, never to return without leave of the king, going the direct way thither with all convenient speed with a cross in his hand, staying there but one flood and ebb, if he could have a passage, and, till he could so pass, going every day into the sea up to his knees, to try if he could pass over, and if he could not pass within forty days, then to put himself again into the church as a felon. *Bl. Com. vol. 4. 332. Finch's Law 388, 389.*

* Nor

* Nor can a man abjure for petty larceny, for the judgment is not to suffer death. *Finch.* 389.*

Nor when he returns, after banishment upon abjuration. *St. P. C.* 117. *a.*

And, he ought to pray the coroner, before the jury are charged: for afterwards, when the jury come back ready to give their verdict, it is too late. *R. 2 H. 7. 3. a.*

And, in these cases, if the coroner takes the abjuration, he shall be amerced. *St. P. C.* 117. *a.*

And, the person who abjures may be hanged; for the abjuration is void. *St. P. C.* 117. *a.*

Vide Justices (S. 11.)

(C. 2.) Consequences of Abjuration.

* All the lands which the felon had at the time of the felony committed, or at any time after, escheated to the lords of the fees, and therefore the time was particularly set down in his confession; and all the goods and chattels which he had at the time of his attainder were forfeited to the king, for which reason also the time of the attainder was particularly expressed. *3 Inst.* 217.*

* His blood was also corrupted, and all other incidents followed, as in case of conviction by indictment. *Ibid.* *

* But his life was saved, unless he returned without the king's leave. *Ibid.* *

* If during the forty days privilege, or in his road to the sea side, he was apprehended and arraigned in any court for the same felony, he might plead the privilege of sanctuary, and had a right to be remanded if taken out against his will. *Bl. Com.* vol. 4. 383.*

(D.) Sanctuary, when allowed.

SANCTUARY was a privilege granted by the king for the safeguard of the life of an offender. *St. P. C.* 108. *a.*

And commenced, and had its force by the grant of the king only, and not of the pope, who had no interest in it, but to consecrate the place. *St. P. C.* 110. *b.* *R. 1 H. 7. 25. b.*

And therefore, cannot be claimed by prescription only, without allowance in *Eyre* within time of memory. *Kel.* 190.

Nor, by the grant of the pope without the grant of the king. *Kel.* 190. *1 H. 7. 26. a.*

Nor, by the grant of the king and pope before time of memory, without usage within time of memory, and allowance in *Eyre.* *R. 1 H. 7. 26. a.*

* By *stat. 1 Jac. 1. c. 25. § 34.* So much of all statutes as concerneth abjured persons and sanctuaries, or ordering or governing of persons abjured, or in sanctuaries made before the 35th of Queen *Eliz.* are repealed and made void.—By this statute the

the

the ancient common law concerning abjuration for felony was revived. 3 *Infl.* 115. *

* But by *stat. 21 Jac. 1. c. 28. § 7.* no sanctuary or privilege of sanctuary shall be hereafter admitted or allowed in any case. *

* Consequently abjuration is also taken away. 2 *Infl.* 628. But this must be confined to such abjuration as had sanctuary for its foundation, abjuration arising on the statutes made against papists being quite of a different nature. *

ABRIDGEMENT.

(A) Abridgment of a Plaintiff, or Demand.

(A. 1.) When it may be.

IN all cases where the writ is general, if the tenant plead non-tenure, joint-tenancy, &c. in abatement of part of the demand, the demandant may abridge his demand to the residue; for the writ remains good for the residue. *Bro. Abridgment* 12.

As, in an assise *de libero tenemento*, if in his plaint he makes title to twenty acres, and the tenant pleads non-tenure to five acres, he may abridge his plaint to fifteen acres. 3 *Lev.* 68.

So, in dower; for the writ is general *de libero tenemento W.* her husband. 3 *Lev.* 68.

So, in ward of body and land. *Th. D. l. 8. c. 28. f. 10.*

So, in *per quæ servitia*. *Th. D. l. 8. c. 28. f. 20.*

So, in an attain, the plaintiff may abridge the false oath. *Per Fortescue, 34 H. 6. 33. Th. D. l. 8. c. 28. f. 20.*

So, in waste, for taking down a copper, and other wastes committed in houses, he may abridge for the taking down of the copper. *Dy. 272. b.*

So, if the plaint or demand be of land and rent, he may abridge for all the rent. *Th. D. l. 8. c. 28. f. 5.*

If it be of divers manors, he may abridge for all one manor. 21 *Ed. 4. 28. [24.] Th. D. l. 8. c. 28. f. 18.*

If it be of a third part of a manor, and a carue of land, he may abridge it for the third part of the manor. 40 *Aff. pl. 4. Th. D. l. 8. c. 28. f. 12.*

Or, of a moiety of a manor. *Th. D. l. 8. c. 28. f. 21.*

So, if it be of a messuage, and four acres of land, he may abridge it for all the messuage. *R. Dy. 6r. b.*

If it be of a moiety of ten acres, he may abridge to a moiety of five acres. *R. Kel. 116. b.*

And now, by the *stat. 21 H. 8. 3.* To prevent delays occasioned by pleas in bar to moieties or parts of lands, in which case the demandant could not abridge his plaint, it is enacted, that in assise the plaintiff may abridge his plaint of any parts, to which any bar is pleaded, as he might in case the bar had been pleaded to any certainty of acres in the plaint.

(A. 2.)

(A. 2.) When not.

But a man cannot abridge his plaint or demand, when it is of an intire thing named in the writ; as, of a manor. *Th. D. l. 8. c. 28. f. 15, 18. Kel. 116. b.*

Nor, of the moiety, or third part of a manor, 'till *stat. 21 H. 8. 3. Semb. Th. D. l. 8. c. 28. f. 18.*

So, if the plaint be of forty shillings rent, he cannot abridge to twenty shillings; for the rent is intire. *Dy. 65. b.*

So, a man cannot abridge his plaint or demand, as to the whole, in one vill named in the writ. *Th. D. l. 8. c. 28. f. 3, 7. 21 Ed. 4. 24. a. 3 Lev. 68.*

As, in assise for lands in two villis, he cannot abridge his demand for the whole in one of them. *21 Ed. 4. 24. a.* For the jurors come the first day out of both the villis. *Fitz. Plaint 7, 19.*

So, a man cannot abridge his demand, if he thereby falsifies his writ; as, if waste be *in domibus et boscis*, he cannot abridge the assignment of all the waste in the houses. *Dy. 272. b.*

Yet in dower, the demandant may abridge her demand of all the land in one of the villis. *R. 21 Ed. 4. 24. a.* for, in dower, the jury do not come the first day. *Fitz. Plaint 7.*

So a man cannot change his demand: as in dower, if the demand be of the third part of a manor, after a view the demandant cannot make her demand of two carues of land. *Th. D. l. 8. c. 28. f. 2.*

So, a man cannot abridge his demand in a *formedon* or other writ, where the parcels are particularly demanded in the writ. *3 Lev. 68.*

A man may abridge his plaint or demand, after an imparlance. *32 Aff. pl. 5.*

And after a view. *Th. D. l. 8. c. 28. f. 2.*

And, after the inquest charged, and before verdict. *33 H. 6. 18.*

So, at any time before verdict.

Or, at any time before judgment. *Kel. 116. Semb. Dy. 88. a.*

But, after judgment he cannot abridge his plaint, though error be brought. *2 Brownl. 237.*

A B S E N T S.

Vide Parliament, (D. 20.)

A B S O L U T I O N.

Vide Excommungement, (C.)

A C C E D E A S A D C U R I A M.

Vide in Pleader (3 K. 9.)

ACCEPTANCE.

- Acceptance of Administration. *Vide Abatement*, (H. 45.)
 ——— of a Bill of Exchange. *Vide Merchant*, (F. 6, &c.)
 ——— of a Dignity. *Vide Abatement*, (H. 44.)—*Esq[ui]re*,
 (N. 6.)
 ——— of an Estate. *Vide Esloppel*, (A. 3.)
 ——— of an Office. *Vide Officer*, (K. 5.)
 ——— of Rent. *Vide Condition*, (P.)

ACCEPTOR.

Acceptor of a Bill of Exchange. *Vide Merchant*, (F. 13, 14.)

ACCESSORY.

Vide in Justices, (T. 1, &c.)

ACCIDENT.

(*Vide Chancery*, (Z.—4 D. 10.—4 H. 4.—4 O. 3.)—
Pleader, (3 M. 31.)

* At common law, before either the statute of *Marlebridge* or *Westminster* the second, there were two methods of proceeding against an accountant. One by which the party to whom he was accountable, might, by the consent of the accountant, either take the account himself, or assign an auditor or auditors to take it, and then have his action of debt for the arrearages, or in more modern times an action on the case on *infinimul computassent* as mentioned in the text. Or he might in the first instance have a writ of account, on which after judgment *quod computet*, auditors were assigned by the court, and final judgment pronounced on their report, followed by execution.*

* The first part of the *stat. West. 2. c. 11.* relates to the first of these modes, and where auditors are assigned by the master, and the accountant is found in arrears before them, introduces a more summary remedy than that of an action as at common law, for it orders that "their bodies shall be arrested, and by the testimony of the auditors shall be sent to the next gaol of the king in those parts, and shall be received by the sheriff or gaoler and imprisoned in irons under safe custody living at their own costs till they shall have satisfied their master fully of the arrears;" by ordering that their bodies shall be arrested, it seems to give a power of *detention* of the body, immediately on his being found in arrears: Lord *Coke*, 2 *Inst.* 380. says, a power of commitment: however what follows, "that by the *testimony* of the auditors they shall be sent to gaol," seems to imply that the power of commitment is not *directly* given, but that they ought to certify to the chancery that the accountant is in arrears, and on that certificate a writ should issue for the commitment; and in confirmation of what

what is here suggested, there is a writ in the Register 137. *a.* directed to the keeper of the gaol, reciting the statute, and that it is suggested by the plaintiff that the accountant had been found in arrears before auditors appointed in consequence of the statute, and ordering the gaoler to receive him into his custody—By the following clause in the same part of this statute, if the accountant be aggrieved by the auditors, he may have a writ called *ex parte talis*, which is in nature of a commission to the barons of the exchequer; but of the nature of this writ more will be said (E. 14.)—However this summary remedy does not apply to the case where the master himself takes the account, or where he assigns but one auditor, for the act uses auditors in the plural number: nor in the case of *auditors* does it take away the common law remedy by action. 2 *Inst.* 380. Neither does this act in any of its branches extend to guardian in focage. *Ibid.* *

* In the writ of account, the process by the common law was summons, attachment and distress infinite; the statute of *Marlebridge*, c. 23. gave attachment by the body, if the bailiff had no lands by which he might be distrained: and the latter branch of the statute *Westminster* 2. c. 11. gave process of outlawry: but though attachment by the body given by *Marlebridge* extends to guardian in focage, yet the outlawry by *West.* 2. does not. 2 *Inst.* 144. *

* On the statute of *Marlebridge* a writ of *monstravit* is formed, as appears in the Register 136. *b.* but the process given by that statute is not confined to that writ but extends to the writ at common law.—It was thought proper to say thus much, because the books in general do not seem to distinguish with sufficient accuracy between the different remedies alluded to by the statute of *West.* 2. *

A C C O M P T.

(A. 1.) When it lies.

AN action of account lies only against a man as guardian, bailiff, or receiver. *Co. Lit.* 172. *a.* 2 *Inst.* 379. 1 *Roll.* 117. l. 43. *Dan.* 220.

If a man be accountable to another, he before any suit may take the account by himself, and afterwards maintain debt against him for the arrearages of the account.

Or, may have an action upon the case, and declare upon an *insimul computasset*.

So, he may assign an auditor for taking his account, and afterwards have debt for the arrearages upon the account before such auditor. 1 *Leo.* 219.

Such an auditor *pro hac vice* may be assigned by parol. *Per two J.* 1 *Leo.* 219.

But, an auditor assigned generally for all his bailiffs or receivers, must be by deed. *R.* 1 *Leo.* 219.

The auditor assigned may take the account, make allowances, and assess the arrearages. 1 *Leo.* 219.

And every thing, that he does lawfully, binds his master.
1 *Leo.* 219.

But, an auditor *pro hac vice* cannot do so in any other case. 1 *Leo.* 219.

So, an auditor cannot bind his master by unlawful allowances.
1 *Leo.* 219.

And his determination upon the whole account, is as a judgment, and ought to be certain. *R.* 1 *Leo.* 219.

And therefore, if an account be against any one as servant or apprentice, it is not good. 2 *Inst.* 379.

Or, as a comptroller, surveyor, messenger, &c. 2 *Inst.* 379.
F. N. B. 119. *C. Co. Litt.* 172. a.

Yet the king may alledge generally, that the defendant *ad compot' domino regi tenet.* 2 *Rol.* 161. O. 11 *Co.* 90. a. E. of Devon. Godb. 291.

So, account lies for the king, for taking any goods of the king. 11 *Co.* 90. a. 1 *Rol.* 161. l. 10. *Vide Dett.* (G. 1.)

Though they are taken by one by colour of his office. *R.* 11 *Co.* 90. b. *Cro. El.* 545.

Though they come to the king by devise, and never were in his possession; for the law creates a privity. 2 *Rol.* 161. l. 17. 11 *Co.* 90. a.

Though they are taken wrongfully; for the law will not put the king to his action of trespass. 2 *Rol.* 161. l. 12.

As, if *A.* enters upon the king's land wrongfully, and takes the profits. 2 *Rol.* 161. l. 12.

But, if money is paid to *A.* which he does not know to be the king's money, *A.* shall not be accountable for it. *Cro. El.* 545.

(A. 2.) Against a Guardian.

Accompt lies for the heir at the age of fourteen years against his guardian in *foage*. *Co. Lit.* 89. a.

And if the heir die before fourteen, his executor shall have accompt against the guardian presently. 2 *Inst.* 404.

So, it lies against the parent of an infant, who receives the profits of his land. *F. N. B.* 117. B.

So, against him who enters as guardian in *chivalry*, where the tenure was only in *foage*. 2 *Rol.* 117. l. 50.

So, it lies against a stranger, as guardian, who enters and receives the profits of the land of an infant during his non-age. *F. N. B.* 118. B. *Co. Lit.* 89. a, b. *Cro. Car.* 229. *Reg.* 136. b. (a)

A guardian shall not be charged as receiver; for a receiver shall not be allowed his expences, as a guardian shall. *Co. Lit.* 172. a. 1 *Rol.* 119. l. 45.

So, an occupier of a copyhold shall not be charged as guardian. *Cro. Car.* 229.

(a) The writ in the Register against the guardian recites the statute of *Marlebridge*, c. 17. But that statute is only in affirmance of the common law. 2 *Inst.* 135.

(A. 3.) Against a Bailiff.

Accompt lies against one as bailiff, who receives for another uncertain profits; as, where a man appoints another his bailiff to collect the rents of his manor. 1 *Rol.* 118. l. 40.

Or, to be bailiff of his hundred. 1 *Rol.* 119. l. 2. *F. N. B.* 118. *E.*

Or, of his court. *F. N. B.* 118. *E.*

Or, to be bailiff of his park, pifchary, &c. and he shall account for the deer, fishes, &c. and other profits of the soil. *R.* 10 *H.* 7, 6, 30.

So, if a guardian receives the profits of the estate of an infant after his age of fourteen years, he shall be charged as bailiff. *F. N. B.* 118. *B.* 2 *Inst.* 380. *R.* 2 *Cro.* 219. *Co. Lit.* 90. *a.*

So, if a man of his own head receives the profits of my land. *F. N. B.* 117. *A.*

So, if a man, by the appointment of the king, or his own head, receives the profits of the land of a lunatic, he is accountable to the lunatic as bailiff. 4 *Co.* 127. *b.*

So, if a man delivers goods to *A.* to sell, which he sells. 1 *Rol.* 118. l. 35.

And, if the bailee sells nothing; yet he may be charged. 1 *Rol.* 119. l. 25.

So, if a bailment be to deliver to another; before the delivery the bailor may charge him in account. 2 *Leo.* 31.

So, if a man be a bailiff by his office, he may be charged in accompt as bailiff, though he be appointed to collect certain rents: as, if a man prescribes to have a bailiff to collect fee-farm rents, issues, and amerciaments, though they are certain. 1 *Rol.* 118. l. 50.

But, generally, a man who receives a certainty cannot be charged as a bailiff: as, if a man be appointed to receive the rents of a manor, which is in lease at a certain rent. *R.* 1 *Rol.* 119. l. 5. *Dan.* 215.

Or, to receive all my rents; for rent is certain. 1 *Rol.* 118. l. 45. 119. l. 40.

So, a surveyor of a manor shall not be charged as bailiff, where there is another bailiff. 1 *Rol.* 119. l. 20.

So, a receiver shall not be charged as bailiff. 1 *Rol.* 119. l. 10.

Nor, a bailiff as receiver; for a bailiff shall be allowed his expences, a receiver not. *Co. Lit.* 172. *a.* 1 *Rol.* 119. l. 45.

But, he may be charged as bailiff and receiver of several things, in the same action. 1 *Rol.* 119. l. 15. *F. N. B.* 116. *P.* *Vide Ent.* 75.

(A. 4.) Against the Receiver.

Accompt lies against one as receiver, who is appointed to receive the rents, or debts of another. *F. N. B.* 116. *P.* 1 *Rol.* 116. l. 25.

So,

So, if he receives them without direction. *F. N. B.* 116.
 2. 1 *Rol.* 119. l. 40. 3 *Leo.* 24.

So, if they are delivered to him for a special purpose, and he does not perform it; as, if *A.* receives money to be delivered to *B.* and he does not deliver it. *F. N. B.* 116. 2. 1 *Rol.* 116. l. 14, 22.

Or, to be re-delivered, if he does not make an assurance of certain land, and he does not make the assurance. *F. N. B.* 118 *G.* 1 *Rol.* 116. l. 10.

Or, to be delivered to *B.* for my use, and he gives them to *B.* 1 *Rol.* 116. l. 17.

Or, for the relief of *B.* for that is to his use. *Dan.* 216. pl. 16. *Lut.* 48. *R. Cro. El.* 82.

Or, to buy goods, &c. 3 *Leo.* 38.

So, if a man employs *A.* to receive money of *B.* and he employs him to borrow it of *C.* and *A.* borrows it accordingly, for which *B.* gives his bond to *C.* yet account lies by the employer against *A.* upon the receipt by the hand of *B.* *R. Hob.* 36. 1 *Rol.* 119. l. 50. *Win. Ent.* 6. *Mo.* 862.

So, if a receiver appoint a deputy, account lies by him against his deputy. 1 *Rol.* 118. l. 20.

So, account lies by a sheriff against his deputy. 1 *Rol.* 118. l. 25.

So, if a man be bound by a bond to make accompt, account lies against him.

Or, if a man by obligation acknowledges, that he has received money *ad computandum.* 1 *Rol.* 116. l. 20.

Or, has money of *A.* in his hands. 1 *Rol.* 116. l. 27.

So, if a man acknowledges the receipt of money, and covenants to make accompt thereof, account lies though the party may have covenant. *R.* 1 *Rol.* 116. l. 45.

So, if a man devises land to be sold for the payment of legacies out of the money raised by the sale, account lies by the legatees after the sale against the executors who sold. 1 *Rol.* 116. l. 35. *Dy.* 151. b. 152. a. *Vide Dy.* 264. b.

If the receipt be from the plaintiff himself, he ought to declare against the defendant as his receiver.

So, if the receipt be by the wife of the plaintiff; for that is from the plaintiff himself. 1 *Rol.* 120. l. 17. *Cont.* l. 27.

Or, by the plaintiff's monk. 1 *Rol.* 120. l. 20. *Cont.* l. 29.

Or, by the wife, or monk of the defendant; for that is a receipt from the defendant himself. *F. N. B.* 118. *F. Cont.* 1 *Rol.* 120. l. 15, 25.

But, if the receipt be by the hand of a stranger, the plaintiff must declare of a receipt by the hands of such a one. 1 *Rol.* 120. l. 40. *F. N. B.* 118. *F.*

So, if the receipt be by the hands of the wife, or monk of a stranger, he ought to declare of a receipt by the hands of such wife, or monk. 1 *Rol.* 120. l. 31. *K.*

And, he cannot declare of a receipt by the plaintiff, and a stranger; for that requires two issues. 1 *Rol.* 120. l. 35.

But,

But, of a receipt by two strangers, he may. 1 *Rol.* 120. l. 33.

If the plaintiff declares against the defendant, of a receipt by his own hands, he may wage his law. 2 *Sand.* 65.

Otherwise, if he declares of a receipt by another hand. *Co. Lit.* 295. a. 2 *Sand.* 66.

(B) For whom it lies.

A Tenant in common may have accompt against his companion, who takes all the profits of the land. *F. N. B.* 117. *D.* 118. *I.* *Dan.* 217, 219.

So may a jointenant, if the profits are taken for the common benefit of both. 1 *Rol.* 117. l. 25. *Dan.* 217.

Otherwise, if a jointenant takes all the profits for his own use. 1 *Rol.* 117. l. 30.

But now, by the *stat.* 4 & 5 *Ann. c.* 16. Account may be brought by one jointenant, or tenant in common, his executor or administrator, against the other, as bailiff, for receiving more than comes to his proportion; and against the executor, or administrator of such jointenant, or tenant in common.

But, not as receiver. *Per C. B. M.* 4 *Geo.* 1. *inter Walker and Holiday*, (reported *Comyns's Reports* 272.)

And therefore, the defendant cannot wage his law. *R.* 2 *Mod. Ca.* 303.

By the common law account did not lie by an executor or administrator, for want of privity. *Co. Lit.* 89. b. 2 *Inst.* 404. *Vide post.* (D.)

But now, by the *stat.* *W.* 2. 13 *Ed.* 1. 23. an executor may have account. *Vide Vid. Ent.* 76.

So, by the *stat.* 25 *Ed.* 3. 5. the executor of an executor.

And, by the *stat.* 31 *Ed.* 3. 11. an administrator may maintain it. *Vide Vid. Ent.* 75.

The executor or administrator of an heir, who dies before fourteen, shall have account presently against the guardian in *so-cage*. 2 *Inst.* 404.

And at common law, *per legem mercatoriam*, it lay for the executor of a merchant. 2 *Inst.* 404. *F. N. B.* 117. *E.* *Vid. Ent.* 75.

So, account lies for an abbot, master of an hospital, &c. against a receiver in the time of their predecessor. *F. N. B.* 117. *F.* 2 *Inst.* 404.

For a churchwarden against his predecessor. *Dan.* 219.

So, account lies for the king, against him, who takes the goods of the king. 11 *Co.* 90. 2 *Rol.* 161. l. 10. *Vide ante* (A. 1.)

(C) Against whom it lies.

A N action of account lies against a *feme sole*, as bailiff or receiver. *F. N. B.* 118. *D.* 1 *Rol.* 117. l. 12, 15. *Dan.* 217.

So,

So, it lies against a priest, or chaplain. *F. N. B.* 118. *D.*
1 Rol. 117. *l.* 17.

So it lies against an abbot for a receipt when he was a monk.
1 Rol. 117. *l.* 20.

But by the rule in the Register, accompt does not lie against an executor, or infant. *Reg.* 135. *a.* *Vide post.* (*D.*) *Vide F. N. B.* 118. *D.* *1 Rol.* 117. *l.* 10.

Nor, against a wife or chaplain. *Reg.* 135. *a.*

(D.) When it does not lie.

BUT account does not lie where there is a want of privity: and therefore, if *A.* receives all the debts of the testator without authority, the executor shall not have account against him. *1 Rol.* 117. *l.* 35.

So, if the bailiff or receiver of *A.* makes a deputy, *A.* shall not have account against him. *F. N. B.* 119. *B.*

So, if *A.* acts as a guardian, and employs *B.* to receive the profits and rents of the infant for him, though he be not guardian of right, yet the infant shall not have account against *B.* who was only a servant to *A.* and there is no privity between him and the infant. *Dub.* *1 Rol.* 117. *l.* ult.

If I give money to *A.* to deliver to *B.* for my use, and *A.* gives it to *B.* account does not lie against *B.* for he was not privy to the use. *1 Rol.* 118. *l.* 5.

If one executor takes the whole estate of the testator, account does not lie against him by the other; for one may take and dispose of the whole, and there is no privity of receipt between them. *1 Rol.* 117. *l.* 35, 118. *l.* 10.

If a disseisor appoints *A.* the receiver of his rents, account does not lie against *A.* by the disseisee. *R.* 3 *Leo.* 24.

If administration be granted during the minority of an executor, he shall not have account against the administrator at his full age. *R.* 1 *And.* 34.

If a termor devises his term to the executor for life, and afterwards to *B.* and the executor of the executor takes the profits, *B.* shall not have account. *R.* *Dy.* 277. *b.*

So, account did not lie against an executor for want of privity. *Co. Lit.* 90. *b.* *F. N. B.* 117. *E.*

But now, by the *stat.* 4 & 5 *Ann.* 16. account lies against the executors or administrators of every guardian, bailiff or receiver.

And by the common law, the king by his prerogative may have account against an executor. *2 Rol.* 161. *l.* 45. *11 Co.* 90. *a.* *Godb.* 291.

Or, against a receiver of the king's money by any person, though there is a want of privity. *R.* 4 *Leo.* 32. *11 Co.* 90. *a.* *2 Rol.* 161. *l.* 15, 20. *Vide in Dett.* (*G.* 1.)

So, against the heir of an accountant. *2 Rol.* 162. *l.* 5.

Or if there is no heir or executor against the terre-tenants. *2 Rol.* 162. *2.* *Vide in Dett.* (*G.* 6.)

So,

So account does not lie against an infant; for he has not discretion. *Co. Lit.* 172. a. *F. N. B.* 118. D. 1 *Rol.* 117. l. 10. *Dan.* 217.

Nor against a man for a receipt, whilst he was an infant. 1 *Hol.* 117. l. 5.

So, account does not lie for a direct wrong; as for waste committed by tenant by *elegit*. 1 *Rol.* 116. l. 42.

Or, if a lessee wastes the goods demised. 1 *Rol.* 116. l. 39.

So, it lies not against a disseisor or other wrong-doer. *Dan.* 218. 3 *Leo.* 24.

Nor, against him, who takes tithes by wrong after severance. *Dan.* 218. R. 3 *Leo.* 24.

Nor, against *A.* who enters and takes the profits of land upon pretence of a devise, if the will be afterwards avoided. R. 3 *Leo.* 24.

But the king by his prerogative may have account for a thing done by wrong. 2 *Rol.* 161. l. 12, 17. *Vide ante* (A. 1.)

So, account does not lie, where a man claims the property.

So, it does not lie, where a man has only a bare custody, as, a shepherd.

(E.) The Proceeding in Accompt.

(E. 1.) Process.

BY the common law, the process in accompt was summons, attachment, and distress infinite. 2 *Inst.* 380. 1 *Brownl.* 24.

But by the *stat. of Marlebridge*, 52 H. 3. 23. *si ballivi qui compotum suum reddere tenentur se subtraxerint, et tenementa non habuerint, per que distringi possunt, per corpora attachientur*, &c. *Reg.* 136. b. 2 *Inst.* 143.

And therefore, if such bailiff hath not any lands for his own life, or to which he is entitled as tenant by the curtesy, the plaintiff may have a *monstravit de compoto* upon this statute. 2 *Inst.* 143. *F. N. B.* 117. H.

And this writ lies against a receiver. 2 *Inst.* 144. And against guardian in *soage*. *Ibid.*

But it lies not, if the accomptant has any lands, though not to the value of the account. 2 *Inst.* 144.

Nor, if he be seised in right of his wife, if she has issue whereby the husband may be intitled by the curtesy. *Ibid.*

Nor does it lie without an *affidavit* in chancery. *Ibid.*

And, if it be awarded upon a false suggestion, a writ shall go *ad liberand' arrestat'*. *Reg.* 137. a.

So, essoin lies in account, where an attachment may be returned. 1 *Brownl.* 24, 25.

So, by the *stat. W.* 2. 13 *Ed.* 1. c. 11. process of outlawry is given in account. 2 *Inst.* 381.

But this does not extend to account against a guardian. 2 *Inst.* 380. *Co. Lit.* 89. a.

Accompt may be brought in the county by justices, or in *C. B.* *Reg.* 135. *But when brought by justices, it may be removed into

into *C. B.* by the plaintiff without cause, and by the defendant with cause. *Vide Reg. 136. b.* But a plaint in accompt cannot be made in the county court without justices, though under the value of 40s. because, the sheriff cannot assign auditors who are judges of record, and the county court is no court of record. *2 Inst. 380.**

So, in the *Cinque Ports* by *audita querela*. *Reg. 135. a.*

So, a commission may go to hear the accounts of the repairs of a vill, &c. *Reg. 138.*

(E. 2.) Declaration.

The declaration in accompt must charge the party; as guardian, bailiff, or *receptor denariorum*. *Vide ante (A. 1.)*

And a declaration in accompt against one as guardian, usually recites the statute of *Marlebridge*. *Cro. Car. 229. F. N. B. 118. A.*

But that is not necessary. *R. Cro. Car. 229.* *Because an action of accompt lay at common law before that statute. *See the Writs in the Register, fol. 135.**

A declaration by *A.* alone against *B.* as bailiff *ex quocunque contractu ad communem utilitatem A, B, et C.* is good; for perhaps *A.* alone entrusted his part to him. *Dan. 219. F. N. B. 118. H. R. 2 Cro. 410.*

A declaration *ad computand' cum inde requisit'* is good, though there was no express request. *R. Cro. El. 83.*

A declaration against a receiver *ad computand'* generally is good, though the receipt was special, to expend for their relief. *R. Cro. El. 83.*

But, if a writ be against the defendant as receiver, a declaration upon a receipt *ad merchandizandum*, for which he is chargeable as bailiff, is not good. *R. 4 Leo. 39. 2 Lev. 126. Cro. El. 83.*

Yet the defendant shall not have advantage of this, except upon a demurrer to the declaration: for if there be judgment *quod computet* by default, &c. judgment shall be given for the plaintiff, and the declaration shall be aided. *R. 2 Lev. 126.*

The declaration may charge the defendant as bailiff, and likewise as receiver. *F. N. B. 116. P. Vide ante (A. 3.)*

A declaration against a receiver must say, by whose hands, *Co. Lit. 172. R. M. 4 Geo. 1. inter Walker and Holliday. (Reported Comyns's Reports 272.) Vide ante (A. 4.)*

But the omission is only form, and aided by a judgment, *quod computet*. *R. 2 Lev. 126.*

And the writ may be general, as *receptor denariorum*; for it is sufficient if it be in the count. *F. N. B. 118. F. R. 2 Leo. 118.*

So, the declaration may charge one as receiver by the hand of *A.* though *A.* was only a servant to *B.* *R. Cro. El. 83.*

(E. 3.) What Pleas are good in Accompt.

(E. 3.)
By a guardian.

To accompt against a man as guardian, the defendant shall plead in abatement:

Or,

Or, in bar, that he never was guardian. *Raft.* 21.

That he was guardian at such a time, and had rendered an account, with a traverse of the time before, and after. *Ibid.*

So, in accompt against a man as bailiff, it is a good plea, that he never was his bailiff to render an account. *1 Rol. 121. l. 5.* (E. 4.)
By a bailiff.
Co. Ent. 46.

And, if the declaration charges him as bailiff of a manor, and that he had the care of certain goods, *ne unques son bailife* is a good plea for the whole. *1 Rol. 121. l. 12, 15.*

But to say, that the plaintiff sold him the goods is not sufficient, without answering that he never was his bailiff. *1 Rol. 121. l. 10.*

So, it is a good plea, that he was his servant for such a purpose, *without that*, that he was his bailiff in other manner. *1 Rol. 121. l. 17.*

That the plaintiff leased to him the land, of which he is supposed the bailiff. *1 Rol. 121. l. 20.*

That the plaintiff was a disseisor, and the disseisee hath re entered. *2 Rol. 122. l. 52.*

That he hath accounted before the plaintiff. *Raft.* 17.
Lut. 58.

Or, before auditors assigned. *1 Rol. 122. l. 39. Raft.* 17.

[Or a discharge to a common intent is sufficient; as if defendant says that he put the goods in a warehouse, whence they were taken by the enemy. *Goswell v. Dunkelly, H. 12 G. Str.* 680.]

So, the defendant may plead the statute of limitations. *Vid. Ent.* 76.

But the plaintiff may reply, that it was an account between merchants. *Vid. Ent.* 76.

So, in account against a man as receiver, it is a good plea, that he never was his receiver. *Raft.* 19. *Lut.* 47. (E. 5.)
By a receiver.
Co. Ent. 47. d.

That he never was his receiver by such a hand. *Cro. El.* 82.
Lut. 47.

That the plaintiff gave him the money. *1 Rol. 121. l. 45.*

Or, assigned it for satisfaction of his debt. *1 Rol. 121. l. 47, 50.*

That it was delivered to him for such a purpose, which he has performed. *1 Rol. 122. l. 10, 15, 30. 12 Leo. 31. 2 Brownl. Ent.* 3.

That he was within age. *1 Rol. 122. l. 50.*

That his wife did it without his assent. *1 Rol. 122. l. 45.*

That he has accounted to the plaintiff, or before auditors. *1 Rol. 122. l. 35, 40. Raft.* 20.

That there was an award in discharge. *Lut.* 52. *1 Rol. 123. l. 10. Vide Accord (A. 1.—D. 1.)*

That the plaintiff has released. *1 Rol. 123. l. 5, 7.*

But, if the plaintiff charges the defendant as his receiver, from such a day to such a day, the defendant must answer it precisely,
and

and it is not sufficient to say, that he was receiver of such a sum, and traverse, that he was receiver *alio modo*. R. Ray. 57.

So, in account against a man as receiver by his own hands, the defendant may wage his law. 2 Sand. 65.

Otherwise, if he be charged as receiver by the hands of another. 2 Sand. 65, 6.

(E. 6.) What Pleas are not good.

[If defendant is once chargeable and accountable, he cannot plead in bar, except a release or *plene computavit*, and these must be pleaded specially, not given in evidence on *ne unques receiver*. Godfrey v. Saunders, P. 10 G. 3. 3 Willf. 73.]

But a plea is not good, that admits the defendant to be once chargeable, though it goes in discharge; for that shall be pleaded before auditors.

As, a gift after receipt, without deed. 1 Rol. 124. l. 10.

Or, an allowance, after the receipt, to retain it in satisfaction of a debt. 1 Rol. 121. l. 25, 123. l. 52.

Payment by order of the plaintiff. 1 Rol. 121. l. 27, 122. l. 22.

That the plaintiff acquitted him of the sum demanded; for this only amounts to a payment. 1 Rol. 123. l. 45.

That he has delivered it to the plaintiff. 1 Rol. 122. l. 20, 27.

That being churchwarden, he carried the bell to a bell-founder to be cast, and with the stones demanded repaired a window. 1 Rol. 121. l. 30.

That the plaintiff accepted cloth in satisfaction. 1 Rol. 123. l. 46.

That he sold the goods received for the plaintiff, and took an obligation for the money in his name. 1 Rol. 124. l. 5.

That he was robbed of the goods. 1 Rol. 124. l. 20. Dub. Mo. 462.

That the goods were taken from him by pirates, &c. R. Ow. 57. Sed vide supra (E. 3.)

That the plaintiff was barred in *trover* for the same goods; for he may be accountable, though he did not convert them. R. Mo. 463.

(E. 7.) Auditors assigned.

If there be judgment, *quod def. computet*, the court may assign auditors to take the account. Lut. 48. Sav. 54.

And two officers of the court are usually assigned. Br. Jud. 17. Vide Lut. 48.

But an account by the defendant before the plaintiff himself is good, though he is not compellable to it. 1 Sand. 49.

So, the plaintiff may assign auditors *pro hac vice* by parol, and an account before them by the defendant is good. 1 Leo. 219. Vide ante (A. 1.) Vide infra.

After judgment, *quod computet*, no motion can be made in arrest of judgment. R. 1 Sid. 159.

But, if the plaintiff after judgment, *quod computet*, dies, his executor shall have a *scire facias ad computandum*. *Dan.* 233.

And if the plaintiff makes default, he may afterwards have a *scire facias ad computandum*. *Dan.* 233.

So, if the second judgment be reversed. *R. Cro. El.* 806.

If the defendant does not appear to account after judgment, *quod computet*, a *capias ad computandum* lies against him. *Cro. El.* 82. *1 Leo.* 87. *Vide Cro. El.* 806.

So, by the *stat. W.* 2. 11. the lord may assign auditors to his servant to take the account.

But this extends not to a guardian in *socage*, for he is no servant to the heir. *2 Inst.* 380.

And one of the auditors cannot take the account; for the act is a commission to both the auditors assigned, which cannot be executed by one of them. *2 Inst.* 380.

Auditors *pro hac vice* may be assigned by the plaintiff without deed. *Per two J.* *1 Leo.* 219. *Vide supra.*

And such auditors are judges of record. *2 Inst.* 380.

But a general auditor to take account of all bailiffs, receivers, &c. is an officer, who cannot be made without patent. *1 Leo.* 219.

(E. 8.) What they ought to do.

After auditors assigned by the court, the defendant shall be committed 'till he find manucaptors *ad computandum*. *Co. Ent.* 46. *Lut.* 48, 49, 60. *Cro. El.* 82.

And if the defendant does not appear afterwards, a *scire facias* goes against the manucaptors. *Vid. Ent.* 77.

How bail shall be in account. *Vide in Bail (G. 2.)*

The auditors must give the defendant a day to make his account. *Lut.* 49.

And, the defendant must be in court, when a day is given him. *R. Cro. El.* 806.

And he ought to appear *de die in diem*, 'till his account is finished. *Co. Ent.* 46. *d.*

And, if the account cannot be finished by the day given, the auditors may grant another day.

Or, if the day prefixed to the auditors for taking the account be expired, upon a certificate, that the account was confused and cannot be determined, the court enlarges the day. *Lut.* 49. *Rast.* 14.

If the defendant does not appear at the day assigned, being mainprized, a *capias ad computandum de novo* may issue. *R. 1 Leo.* 87.

Vide stat. W. 11.

(E. 9.) The Account, how made.

The account shall be given into court in *Latin*. *Lut.* 63.

*This was before the *stat. 4 G. 2. c. 26.* which orders all pleadings to be in *English*.*

If

If the defendant have pleaded *plene computavit*, he shall account for the whole alledged in the declaration. *Lut.* 63.

Yet, if the declaration be for foreign coin *ad valorem tant' monet' Anglic'*, the defendant need not account for the foreign money as it is valued in the declaration. *R. 1 Rol.* 126. *l.* 16.

(E. 10.) Accountant how charged.

If a man receives money *ad merchandizum*, he ought to account for the profits made after the receipt. *1 Rol.* 125. *l.* 35, 36.

So ought a bailiff, *curam habens ad proficuum inde faciendum*. *1 Rol.* 125. *l.* 50.

So he shall be charged for the profit which he might have made; as, if he retains money in his hands, when he might improve it. *1 Rol.* 125. *l.* 40. *10 H.* 7. 6.

Or, does not improve it so much as he might. *1 Rol.* 126. *l.* 1.

So, if a bailiff sells goods at a less rate. *1 Rol.* 126. *l.* 4.

Yet, a bailiff or receiver *ad merchandizum* shall be excused, if he makes oath that he found nothing to buy without hazard of a loss. *1 Rol.* 124. *l.* 35.

And, such plea may be without oath, if the plaintiff does not require it. *2 Mod.* 101.

And the plaintiff cannot aver contrary to the oath. *1 Rol.* 124. *l.* 43.

And, a receiver *ad computandum*, or to deliver over, shall not be charged for the profit after the receipt. *1 Rol.* 125. *l.* 21. 30, 33.

(E. 11.) Plea before Auditors.

[A matter which might have been pleaded in bar cannot afterwards be pleaded before the auditors. *Godfrey v. Saunders. P. 10 G.* 3. *3 Wilfon* 73.]

[And nothing can be pleaded before auditors contrary to what was pleaded in bar, and found by verdict. *Ibid.*]

Before the auditors the defendant may plead, and the plaintiff or defendant may join issue, or demur upon the pleadings, which shall be certified to the court, and there tried or argued. *Lut.* 50.

The defendant may plead, that he has paid to the plaintiff or his order. *1 Rol.* 87. *Vide post.* (E. 12.)

Or, expended for his maintenance. *Lut.* 50. *Cro. El.* 83, 84.

Or, accounted before the plaintiff himself. *R. Lut.* 59.

So, it is a good plea before auditors, that the defendant lost the thing by inevitable accident. *Co. Lit.* 89. *b.*

As, that he was robbed without his default. *Co. Lit.* 89. *a.* *4 Co.* 84. *a.* *1 Rol.* 124. *l.* 33. *Vide post.* (E. 12.)

*Or that the goods were burned without his default. *Semb.* *2 Mod.* 101.*

That in a tempest the goods were cast into the sea, for the preservation of the ship. *1 Rol.* 124. *l.* 27. *Co. Lit.* 89. *b.*

That

That the ship was seized by the king's enemies, and he paid so much for the redemption of it. *R. 1 Rol. 124. l. 45.*

So, the defendant may plead before auditors, the act of oblivion. *Dan. 229. R. Ray. 57.* *So a discharge to a common intent is sufficient; as, where the plaintiff counted for a watch and sword, delivered to the defendant *ad merchandizandum*, he pleaded that he carried them to *Porto Bello*, and to keep them safe till he could sell them, put them into the warehouse of the *South-Sea Company*, and that the warehouse was broke open by enemies, and the watch taken away and lost, and that the sword had been likewise taken away, *unless* an *Englishman* had put it on, and claimed it as his, and that defendant *was* forced to come away before he met with the *Englishman* to get it again. This was held good on demurrer. *Str. 680.**

But, the defendant shall not plead before auditors a matter which goes in bar of the account, though he omitted to plead it in bar; as, if a defendant has received money to deliver to *A.* and delivers it accordingly, and afterwards pleads, *ne unques son receiver*, which is found against him, he shall not plead the delivery to *A.* before the auditors. *1 Rol. 126. l. 7. Cro. El. 830.*

So, he shall not plead before auditors, an award before the action commenced. *R. Cro. Car. 116.*

So, the defendant shall not plead before auditors, that he received the money only in discharge of an obligation to him by the son of the plaintiff; for that amounts to *ne unques son receiver*. *R. Cro. El. 830.*

So, if he pleads before auditors, that he paid 100*l.* charged to be received by him to the order of the plaintiff, and 600*l.* more, it is void as to the surplus; and if the defendant does not prove the payment of all the sums charged, the plaintiff shall have judgment for so much, and it shall not be deducted out of the surplus. *R. 1 Rol. 87.*

(E. 12.) What Allowances an Accountant shall have.

A guardian, and bailiff shall be allowed upon account all reasonable costs and expences in all things. *Co. Lit. 89. a.*

So, a bailiff of a manor shall be allowed upon account a casual thing payable of course, though it be paid without a special warrant: as, if he pays a relief due. *1 Rol. 125. l. 7.*

So, if he pays rents, &c. due out of the manor, which belong to his office to pay. *1 Rol. 126. l. 32.*

So, if he pays any sum by order or command of the plaintiff. *1 Rol. 126. l. 36.*

Though the command was only by parol. *1 Rol. 126. P.*

So, if a guardian or bailiff be robbed without his neglect or default, it shall be allowed upon his account. *Co. Lit. 89. a. Vide ante (E. 11.)*

So, if a merchant's factor be robbed. *Co. Lit. 89. a.*

So, a guardian, bailiff, or receiver shall be allowed upon account all that is lost by inevitable accidents: as, by lightning. *Co. Lit. 89. b.*

By

By shipwreck. *Co. Lit.* 89. *b.* *Vide ante* (E. 11.)

(E. 13.) What not.

But, a receiver shall not be allowed for his expences. *Co. Lit.* 172. *a.* *Vide* 1 *Rol.* 87.

So, a man who becomes my bailiff of his own wrong, cannot claim an allowance for his expences. 1 *Leo.* 219.

So, a bailiff shall not be allowed the payment of a thing that is not casual, and of course, without a warrant from his master. 1 *Rol.* 125. *l.* 11.

Nor, of a thing collateral that does not concern my manor. 1 *Leo.* 219.

So, a bailiff shall not be allowed for his negligence.

So, he shall not be allowed a sale upon credit, without a special commission, though the goods were *bona peritura*. *R.* 2 *Mod.* 100. *Per Fleming*, 1 *Bul.* 104. but *per Williams*, J. it is the common course. 1 *Bul.* 103. (a)

Nor shall he be allowed for gross ignorance: as, if a factor gives 20*l.* for goods not of the value of 12*d.* he shall not be allowed for it though he did as well as he could. 1 *Rol.* 125. *l.* 14.

(E. 14.) Remedy against Auditors.

If the auditors do not allow a sum that ought to be allowed, upon complaint to the court, justice ought to be done. 2 *Inst.* 381. *F. N. B.* 129. *F.*

If in account in *London*, or other inferior court of record, the auditors assigned by the court do not allow the sums which they ought, the accountant shall have a writ *ex parte talis*, to make account before the treasurer and barons in the exchequer, which contains a *scire facias* to the plaintiff to appear there for such intent. *F. N. B.* 129. *G.*

And by the *stat. W.* 2. 11. if the auditors assigned by the plaintiff himself do not do justice; as, if they charge the defendant with receipt of that which he did not receive, or do not allow him his reasonable expences, he shall have a writ *ex parte talis* for his relief. 2 *Inst.* 381. *F. N. B.* 129. *F.*

But this lies not against auditors assigned by the court. 2 *Inst.* 381. *Ruled in Reg.* 137. *b.* *F. N. B.* 129. *F.*

And, this writ is a commission to the barons of the exchequer to do right. 2 *Inst.* 381. *Reg.* 137. *b.*

After this writ, the accountant may find sureties in the chancery, or before the treasurer and barons, and thereupon shall be bailed out of prison. *F. N. B.* 129. *I.* 130. *A.*

(a) Every factor of common right is to sell for ready money; but where the general usage of the trade is, that the factor sells on credit, there if he sells to a person of good credit at the time of the sale, who afterwards becomes insolvent, the factor is discharged; otherwise, if he sell to a man notoriously discredited at the time: but if there be no such usage, and the factor, on his general authority, sells on credit, let the vendee be ever so able, the factor alone shall answer. *Per Holt. C. J.* 12 *Mod.* 514. But now factors usually have a commission to sell on credit.

(E. 15.)

(E. 15.) Judgment.

[The first judgment should be *quod computet*; therefore if jury *Vide Plead-* find for plaintiff, and assess damages and costs, and judgment is *er*, (T. 2.) entered accordingly, and *fi. fa.* executed, and money levied; on motion, the judgment and execution shall be set aside, and the money restored with costs. *Hughes v. Burges*, T. 10 & 11 G. 2. B. R. H. 394. *And* 19.]

If the defendant enters into the account at the day assigned, and afterwards the account is adjourned to another day, and then the plaintiff does not appear, it will be a discontinuance: for there can be no nonsuit after judgment. *R. Cro. El.* 19.

But the plaintiff afterwards may have a *scire facias* upon the judgment *ad computandum*. *R. Cro. El.* 19.

If the defendant refuses to account, the judgment shall be, that the plaintiff recover according to the value mentioned in the declaration. *R. Cro. El.* 806. *R. Winch* 5.

So, if he gives an imperfect account. *Semb. Lut.* 63.

And, there is no need of a writ of enquiry for the value. *Lut.* 63. *Cro. El.* 806.

Though the defendant takes the value of the goods, by protestation. *Dub. Lut.* 63.

And judgment, *quod recuperet* the value of the goods, of which the account is demanded, would be ill. *Lut.* 63. *Cro. El.* 806.

So, if the defendant interplead, and it be found against him, the judgment shall be, that the plaintiff recover his damages and costs. *R. Cro. El.* 84.

So, the plaintiff in account generally may recover damages. *1 Leo.* 302. *R. 2 Leo.* 118. *Vide in Damages* (A. 1, &c.)

(E. 16.) Execution.

After final judgment in account, the plaintiff ought to pray that the body of the accountant be committed in execution. *Lut.* 51.

And, if he refuses his body, he may pray an *elegit*. *Lut.* 51.

And, a writ lies to the gaoler to receive him. *Reg.* 137.

Account in Chancery.

Vide Chancery, (2 A. 1, &c.)

The Court of Accounts in the Exchequer.

Vide Courts, (D. 3.)

Plea of Infirmul Computaverunt in Assumpsit.

Vide Pleader, (2 G. 11.)

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K

Account

A C C O M P T.

Account by an Executor, or Administrator,
in the Spiritual Court.*Vide Prohibition, (G. 21.)*

Account of Officers of Sewers.

Vide Sewers, (F.)

Sheriff's Account.

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A C C O M P T A N T.

Vide Accompt.—Chancery, (2 A. 4, &c.)

A C C O R D.

(A) Accord with Satisfaction.

(A. 1.) When a good Plea.

IN many personal actions, *accord with satisfaction*, is a good plea.

As, in all actions, where damages only are to be recovered.
R. Dy. 75. b. D. 1. Brownl. 134.

In *assumpsit*. *R. Dy. 75. b. Vide Pleader, (2 G. 9.)*

In conspiracy. *1 Rol. 267. l. 15. 9 Co. 78. a.*

In accompt. *Lut. 52. Cro. Car. 116. Vide Accompt, (E. 5.)*

So, in trespass, and all actions *vi et armis*, where outlawry lies by the common law. *1 Brownl. 134. 9 Co. 78. a. Vide Pleader, (3 M. 13.)*

In appeal of mailhem. *6 Co. 44. a. 9 Co. 78. b.*

In an attainr. *6 Co. 44. a. Dy. 75. b.*

In a writ of forging of false deeds. *Dy. 75. b.*

In maintenance. *Dy. 75. b. 9 Co. 78. a.*

In *detinue*. *9 Co. 78. b.*

So, in covenant, after the covenant broken: for the suit does not accrue by the deed, but by the subsequent breach. *R. 6 Co. 44. a. 2 Cro. 100. R. Lut. 359.—Adm. 2 Rol. 188.—Per tres J. Tel. 125.—D. Al. 39. Vide Pleader, (2 V. 8, 9.)*

In debt for rent upon a lease for years. *Semb. 1 Rol. 266. l. 10. 9 Co. 79. a.*

So,

So, in waste in the *tenuit*, against a lessee *pur auter vie*; for damages only shall be recovered. *R. 1. Rol. 266. l. 12. Vide Pleader, (3 O. 9.)*

So, in waste against a lessee for years in the *tenet*, as well as in the *tenuit*, *accord with satisfaction* is a good plea, though the term also shall be recovered. *Per three J. cont. 11 H. 7. 13. 13 H. 7. 20.* But it seems that judgment was not entered; for the record does not appear. *R. acc. Bend. 35. Agr. acc. 9 Co. 78. b. Mo. 6. 6 Co. 44. a. Per Daniel, 2 Cro. 99. R. acc. Cro. El. 356.*

So, in *quare ejecit infra terminum*. *9 Co. 82. 78. b. 11 H. 7. 13.*

In ravishment of ward. *9 Co. 78. b. 11 H. 7. 13. 13 H. 7. 20.*

In *detinue* of charters of a freehold, though the charters are to be recovered. *9 Co. 78. b.*

So, in debt upon a bond to pay money, *an accord executed before the day of payment*. *Cro. El. 46.*

Or, to pay upon a contingency, *an accord executed before the contingency happened*. *Semb. 2 Cro. 254.*

So, in ejectment, though the possession shall be recovered. *Dub. 13. H. 7. 20. R. 9 Co. 78, Peytöe. 1 Brownl. 133, 134. 2 Brownl. 128.*

In *quare impedit*. *Semb. 1 Brownl. 134.—2 Brownl. 131.—11 H. 7. 13.*

So, *accord with satisfaction* to one defendant is a bar to all. *R. 9 Co. 79. b.*

(A. 2.) When not.

But *accord with satisfaction* is no plea, where the inheritance or freehold is to be recovered. *R. 9 Co. 79. b.*

Though the satisfaction be of a matter of as high a nature: as, if a disseisee accept the manor of *D.* in satisfaction of the land, of which he was disseised. *R. 4 Co. 1. b.*

So, it is no plea, if the satisfaction accrues from a stranger: as, if an obligee plead, *that A. surrendered a copyhold to the plaintiff, which he accepted in satisfaction*. *Per two J. Cro. El. 541.*

So, *accord* is no plea, where a certain duty accrues by the deed merely; for a deed ought to be avoided by a matter of as high a nature. *R. 6 Co. 44. a. Bro. Dett. 174.*

As, in debt upon a bill, or bond to pay money. *6 Co. 44. a. R. 2 Cro. 650. R. if not executed before the forfeiture of the bond, though it be afterwards. Cro. El. 46.*

Or, in covenant to pay money. *6 Co. 44. a. Vide 2 Cro. 99. R. Lut. 359.*

Though the accord be before or after the day of payment. *2 Cro. 100. Quere, and vide supra.*

Nor, in a covenant executory, before a breach. *R. cont. 2 Rol. 187. Acc. Lut. 359.*

So, it is no plea in debt upon a bond with condition to make an account, or to do any other collateral thing. *R. Dy. 1. a. 9 Co. 79. a.*

Nor, in a writ of annuity. *Dy. 1. a. in marg.*

[In debt, a feoffment is not pleadable in satisfaction of a specialty. *R.* on error on a judgment in *C. B.* but, this was afterwards reversed in parliament. *Wyvill v. Stapleton*. *M.* 11. *G. Str.* 615.]

(B.) What Accord is good.

(B. 1.) It must be in full Satisfaction.

(B. 1.)
What shall
not be so.
Vide Condi-
tion. (L. 2,
3.)

AN accord, that makes a good plea, must be in full satisfaction of the thing demanded.

And therefore, if the defendant plead an accord between him and the plaintiff, *that if he did his endeavour to reconcile the plaintiff and a stranger, then, &c.* it is not good; for his endeavour is no satisfaction to the plaintiff. *1 Rol.* 128. l. 15.

So, in an action upon the *stat.* of *Rich.* 2. for a forcible entry, if the defendant plead an accord, *that the plaintiff should re-enter, and have his charters re-delivered by the defendant,* it is not good; for the re-delivery to the plaintiff of his own charters is not any satisfaction for his precedent tortious entry. *1 Rol.* 128. l. 25. *Dy.* 356. a. *Pl. Comb.* 5. b.

So, in trespass, if the defendant plead an accord, *that the plaintiff should have his cattle again.* *1 Rol.* 128. l. 35.

That the plaintiff and defendant should be quit of actions against each other. *1 Rol.* 128. l. 40. *Lut.* 57.

So, in covenant for not repairing, *that it was agreed, that the defendant should do the repairs.* *4 Mod.* 88. *For he was bound to do that by the original covenant.*

That he should give a rush, or other thing of no value. *Dal.* 105.

[In *indebitatus assumpsit*, for 15*l.* that he gave plaintiff a promissory note for 5*l.* is not good. Plaintiff's agreement is not sufficient: it must appear to court that he had a reasonable satisfaction. *Cumber v. Wane*, *P.* 7 *G. Strange* 426.]

[Release of equity of redemption is no satisfaction, for it is nothing in the eye of the law. *Preston v. Christmas*, *P.* 32 *G.* 2. 2 *Wilf.* 86.]

So, if the defendant plead an accord by order of a court martial, *that the defendant should make a submission in such a place and before such persons in satisfaction of that matter,* which he did accordingly; for this is no satisfaction for the damage, except in point of honour. *R.* *1 Rol.* 128. l. 50.

Or, *that the defendant should confess the injury to the plaintiff, and ask forgiveness upon his knees.* *Per 2 J.* 2 *Rol.* 96.

So, if he plead an accord, *to deliver, &c. in satisfaction of part of a debt.* *4 Co.* 3. a.

Or, an accord, *to deliver money, in satisfaction of a bond, or other specialty, with condition to perform a collateral matter.* *Co.* *Lit.* 212. b. *9 Co.* 79. a, b.

So, if he plead an accord, *to pay a less sum at the same or a subsequent day.* *R.* *1 Leo.* 19. *Cro. El.* 193. *Vid.* 4 *Mod.* 89.

Or,

Or, to deliver a horse or other thing in satisfaction of money to be paid to a stranger. Co. Lit. 212. b.

[If the debt is on deed or obligation without condition, the accord and satisfaction must be by deed, and must be pleaded so : if there appears a condition for payment of money, perhaps it may be pleaded without deed. *Preston v. Christmas*. P. 32 G. 2. 2 *Wils.* 86.]

But, it is a good bar, if the defendant plead an accord, *that if the defendant did his endeavour to reconcile the plaintiff and a stranger, then, &c.* and that he did his endeavour, whereby at his costs they are agreed. 1 *Rol.* 128. l. 20. (B. 2) What shall be a satisfaction.

So, if he plead an accord, to deliver charters to which he had a title. 1 *Rol.* 128. l. 30.

So, an accord, to deliver to the plaintiff, being cestuy que use, a charter of feoffment, which the feoffees give to him ; for the deed belongs to the feoffees, not to the cestuy que use, and their gift to the defendant was good. *R. Cro. El.* 357.

So, an accord, that he should re-deliver to the plaintiff his own cattle at a certain place, whereby he was at the charge of driving them to that place. *Per Dodr.* 2 *Rol.* 96.

That an executor should quietly relinquish the possession of an house, which his testator held for life to him in the reversion. *Semb.* *Yel.* 125. *Per* three J. *Fenner* cont.

That each should give the other a quart of wine. 1 *Rol.* 128. l. 43.

That he should enter into a statute, or bond in satisfaction of money due by contract. Co. Lit. 212. b.

So, an accord, to deliver money in satisfaction of an horse, or collateral thing due by contract or assumpsit without deed, is good. 9. Co. 79. b.

Or, to deliver a horse, &c. in satisfaction of money to the party himself. Co. Lit. 212.

Though the condition be, that A. shall pay the money to the party. Co. Lit. 212. b.

So an accord, to excuse one from an amercement in a court baron. *Dan.* 239.

So, an accord, to pay so much to A. by the appointment of the plaintiff, in satisfaction, is good. *Win. En.* 1750. *R. Skin.* 391.

To make an abatement in the marriage portion of his daughter. 1 *Rol.* 128. l. 10.

So payment, and acceptance in full satisfaction, of a less sum, either before the day, or at another place than is limited by the condition. Co. Lit. 212. b. For a less sum before the day, or at another place, may be advantageous to the plaintiff.

(B. 3.) Must be certain.

So, an accord must be certain : and therefore, an accord that the defendant shall relinquish the possession of a house in satisfaction, &c.,

&c. is not good, without saying *at what time he shall relinquish it.* R. Per three J. Yelv. 125.

Nor an accord, *that he shall employ workmen in repairs for two or three days.* Semb. 4 Mod. 88.

And though the defendant shews a performance in certain, yet that does not aid an accord, that was uncertain in the foundation. R. Yelv. 125.

But an accord, *that whereas the marriage of his son was worth 500*l.* the plaintiff should give the defendant only 400*l.* whereby 100*l.* was abated in satisfaction of all trespasses,* is good. 1 Rol. 128. l. 12.

(B. 4.) Must be executed.

So, an accord must be executed, otherwise there will be no remedy for a non-performance: and therefore an accord *to pay money in satisfaction,* is not good, if he shews only, *that he is ready to pay;* but he ought to say, *that he has paid it.* 1 Rol. 129. l. 25. R. 1 Leo. 19.

So, if he shews only a tender and refusal. 1 Rol. 129. l. 22. R. 9 Co. 79. b. R. 2 Jon. 6.

So, if he shews a tender, with *uncore prift.* R. Cro. El. 193.

So if he does not shew it to be perfectly executed. R. Dy. 75. b. 356. a. Pl. Com. 5. 9 Co. 79. b.

As, if an accord be to do two things, and he shews only one of them performed. 1 Rol. 129. l. 12. 1 Rol. 471. l. 10. R. Cro. Car. 193. Vide Dy. 356. a.

So, if an accord was, *to pay money, and an attorney's bill,* and he shews, that he paid the money, and was ready to pay the bill, but never had it. R. Ray. 203. 1 Mod. 69. 2 Keb. 690.

It was in the defendant's power to have demanded a bill, and tendered a reasonable sum; if this had been done and pleaded, it might probably have been adjudged a good answer. Bac. Abr. vol. 1. 24.

To pay money, and give counsel upon request, and that he was not requested. Bro. Accord 7.

*To pay 3*l.* with a promise to pay the residue in satisfaction,* and that he had paid the 3*l.* Per Twissd. 1 Mod. 69.

*To pay 15*s.* and that the plaintiff should receive the residue in goods;* and that he paid the 15*s.* and was ready to deliver goods for the residue. R. Cro. El. 305.

So an accord, *that the plaintiff and defendant should each deliver up his part of an indenture to be cancelled,* and that he had delivered his part, is not good; because he does not shew, that both parts were delivered up. R. 3 Lev. 189.

So, an accord, *that A. shall be his paymaster;* for it does not appear, that there was any consideration to charge A. R. Ray. 451.

So, if A. did not agree by writing; for by the *stat. 29 Car. 2.* he is not liable to the debt of another, without a memorandum in writing. Ibid. 2 Jon. 158.

So, an accord must be executed, before the action commenced: and therefore, an accord to do a thing at a day to come, is not good. 1 *Rol.* 129. l. 6. (a)

But, an accord to do a thing at a future day, is good, if it be executed before the action commenced, though it was executory at the time of the accord. 1 *Rol.* 129. l. 17.

So an accord, *with mutual promises to perform*, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance. *Adm. Ray.* 450. 2 *Jon.* 158.

Yet, the remedy ought to be such, that the party might have taken it upon the mutual promise at the time of the agreement. *R.* 2 *Jon.* 168.

(C.) How it shall be pleaded.

IF a man plead an accord, the safest way is to plead it as a satisfaction, and not by way of accord; and therefore he need say no more, than that *the defendant gave so much to the plaintiff in satisfaction, which the plaintiff received.* 9 *Co.* 80. b.

[If a man plead that he delivered a thing in satisfaction he must shew the acceptance of it as such. *Paine v. Masters, M.* 10 *G. Str.* 573.]

If he plead it as an accord, he must shew a precise performance. 9 *Co.* 80. b.

So, if a man pays money upon a void award, which is accepted, it may be pleaded as an accord and satisfaction. *R.* 1 *Sal.* 71.

If a man plead an accord executed before the money was due by the condition, he ought to plead it in satisfaction of the money by the condition, not in satisfaction of the bond. *R.* 2 *Cro.* 254. *for the bond itself cannot be discharged without specialty.*

If he plead it as a mutual agreement, the defendant must shew such an agreement, upon which an *assumpsit* is maintainable. *R.* 2 *Jon.* 158.

And, upon which an action is given at the time of the *assumpsit*. *R.* 2 *Jon.* 168.

(a) Justice and the nature of the thing seem to point out a very material distinction between accords executory on a future day certain, and accords executory without limitation of time: in both cases it appears admitted that if the execution precede the bringing of the action, the accord with satisfaction is a good bar: where there is no day fixed for the execution of the accord, the law implies that it should be immediately, and consequently when the action is commenced before the full performance the accord cannot be taken as a bar; but in the first case where a certain day is fixed for the performance, it seems to the highest degree unreasonable to permit the plaintiff, by bringing his action before the day, to waive his agreement, and to refuse the defendant the advantage of it in pleading: if the action be deferred till after the day, and the accord be not performed by the defendant, he cannot then plead it and the plaintiff must recover on the original cause of action; the only disadvantage he suffers is delay which by his own agreement he has brought upon himself.

And,

And, that the agreement was performed on the part of the defendant, as soon as could be before the action. *Vide Lut.* 1538.

And, how it was performed. *R. Skin.* 391.

To this plea the plaintiff may reply, *quod non recepit in satisfaction.* 9 *Co.* 80. *b.* *R.* 5 *Mod.* 86.

Or, *quod non dedit in satisfaction*; for there must be a mutual payment and acceptance in satisfaction and the one imports both. 5 *Mod.* 86.

Or, *nul tiel accord.* *Win. Ent.* 1075, 1076. *Tho.* 70.

(D.) Arbitrament.

(D. 1.) When it is a Bar.

Vide Ante. (A. 1.) **I**N all actions where *accord* is a good bar, *arbitrament* is also a bar. 6 *Co.* 44. *Semb.* 1 *Rol.* 267. *T.* *Dy.* 75. *b.*

So, an arbitrament between *A.* and *B.* for a trespass done by my cattle, then in the possession of *A.* is a good bar, in an action against me for the same trespass. 1 *Rol.* 268. *B.*

So, an award of a collateral matter, is a good bar. 1 *Sal.* 76. *Mod. Ca.* 221.

So, in debt upon a bond, a submission of all matters in controversy, and an award, that the bond shall be discharged, is a good plea; though a bond by itself cannot be submitted, nor shall *arbitrament* be any plea to debt upon it, generally. *R.* 1 *Lev.* 292. *R.* 1 *Rol.* 264. *l.* 30. *R.* *Al.* 5.

(D. 2.) When not.

But in actions real, *arbitrament* is no plea. 1 *Rol.* 265. *l.* 50. 266. *l.* 1, &c.

Nor, in actions founded merely upon a deed. 1 *Rol.* 265. *T.*

Nor, in actions founded upon a statute or record merely: as in debt for arrears of an account found before auditors. 1 *Rol.* 265. *l.* 5. 264. *R.*

And, if it would be no plea in debt, it is no plea in *assumpsit* for the same debt. *R.* *Al.* 5.

Yet, in an action not founded upon a statute or record only, *arbitrament* is a plea; as, in debt upon the statute of labourers; for it is founded upon the departure of the servant, which is a matter *in pais*, as well as upon the statute. 1 *Rol.* 265. *l.* 10.

So, *arbitrament* is no plea if the party has no remedy upon the award: as if the award be void. *D. Lut.* 57, 283. *Carth.* 188.

If the award be to do a thing, the performance of which the party cannot compel: as *to be nonsuited*; *to deliver lands in satisfaction*, &c. 1 *Rol.* 266. *l.* 35 *ad* 45. 267. *l.* 35. *Lut.* 57.

So, if the award does not give a present satisfaction, or a satisfaction that will be executed before the action commences. *D. Lut.* 56, 283.

Or,

Or, at least if the plaintiff has no remedy by action upon the award. *D. Lut.* 56.

So, if the award does not extend to the thing demanded by the action: as, if the *arbitrament* discharges all accounts, and the action is for money upon an *insimul computasset*. *R. Al.* 5.

So, if the award does not give a new duty, but only discharges the old demand, &c. by release, &c. *R. 1 Sal.* 69.

But generally, the plaintiff may have a remedy upon the award; for the submission imports mutual promises; and therefore, if the defendant pleads *arbitrament*, he need not aver performance generally. *R. in B. R. between Crofts and Harris. P. 3 W. & M. Carth.* 188. *Mod. Ca.* 222. *Dy.* 75. b. *Vide 1 Sal.* 69.

And therefore, if the award be to pay money at a future day; before the day *arbitrament* is a good plea without shewing payment. *1 Rol.* 267. l. 30. *D. Lut.* 56. *R. 5 Ed.* 4. 7. a. *Pl. Com.* 6. a.

So, if the award be of a collateral thing, performance, generally, need not be averred. *Per Holt, Powel cont.* *1 Sal.* 76. *Mod. Ca.* 222.

Yet, where the time of performance is past, *arbitrament* is no bar, without shewing a performance, though the plaintiff has a remedy by action upon the award. *1 Rol.* 267. l. 25, 27. *D. Lut.* 56.

As, if the award be to pay money, or to give a bond at a day past, he ought to shew, that he has paid the money, or given the bond. *Lut.* 56. *5 Ed.* 4. 7. a.

And it is not sufficient to say, *tout temps prijs*, and make a tender in court. *Lut.* 56.

Except where the plaintiff himself is the cause, that it was not performed: as, if the defendant tenders the money at the day, and the plaintiff refuses it. *1 Rol.* 267. l. 40. *Lut.* 283, 56.

If the award be, that the defendant shall seal an obligation, which the plaintiff shall bring to him at such a day; and the plaintiff does not bring any obligation. *1 Rol.* 267. l. 45. *5 Ed.* 4. 7. a.

ACCUSATION.

Vide Parliament, (L. 8, &c.)—Visitor, (A. 13.)

ACQUITTA L.

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A C T I O N.

(A) The Nature of it.

AN action is a lawful demand of a man's right. *Co. Lit.* 285. a. 2 *Inst.* 40.

In life, liberty, and estate, every one, (who has not forfeited them,) has a property, and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrong-doer. *Vau.* 337.

(B) Who may sue.

(B. 1.) The King.

THE king, though he is the chief and head of the kingdom, may sue as demandant. *Th. D. l. 1. c. 3.* 3 *Inst.* 136.

As, in a writ of right. 6 *Ed.* 3. 291. b. [50. b.] *Th. D. l. 1. c. 3. f. 7.*

In a writ of *escheat*. *Th. D. l. 1. c. 3. f. 4.* 3 *Inst.* 136.

In a writ of error. 22 *Ed.* 3. 21. b. 39 *Aff. pl.* 18. *Th. D. l. 1. c. 3. f. 17.*

In a writ of ward. 1 *H.* 4. 1. 3 *Inst.* 136. *Th. D. l. 1. c. 3. f. 18.*

In a *quare impedit*. *Th. D. l. 1. c. 3. f. 15, 16.* 3 *Inst.* 136.

In a right of *advowson*. *Th. D. l. 1. c. 3. f. 3.*

In *deceit* to reverse a fine of land in ancient *demesne*. *Per Thirning*, 11 *H.* 4. 86. *Th. D. l. 1. c. 3. f. 21.*

In an *attaint*. 42 *Ed.* 3. 26. b. 3 *Inst.* 136. *Th. D. l. 1. c. 3. f. 21.*

In debt. *Th. D. l. 1. c. 3. f. 21.* 3 *Inst.* 136.

In trespass. 4 *H.* 4. 4. b. 10 *H.* 4. 3. *Th. D. l. 1. c. 3. f. 19.* for his goods and chattels, or *quare clausum fregit*. *F. N. B.* 90. 1.

In a *scire facias*. 10 *H.* 4. 7. 3 *Inst.* 136. *Th. D. l. 1. c. 3. f. 16, 20.*

In *quare incumbavit*. 3 *Inst.* 136.

So the king may sue in *chancery* for a matter in equity. 1 *Rol.* 373. l. 36.

So the king of another kingdom may maintain an action in *B. R.* or other court. 1 *Rol.* 133.

But, the king shall not have an action, except when the principal cause of action belongs to the king; for upon the peace broken, or any wrong done principally to another, the king shall sue only by indictment. *Th. D. l. 1. c. 3. f. 9, 10, 11.*

Or, by information, or other matter of record. 3 *Inst.* 136.

So, for an offence, or contempt against any statute, the king shall sue only in an action by *qui tam*, &c.

And, a declaration for the king ought regularly to be in the name of the *attorney general*. 2 *Lev.* 82.

Yet,

Yet, if it be in the name of the king himself, as *coram domino rege venit dominus rex*, &c. it is good. *R. 2 Lev. 82.*

Vide F. N. B. 101. A.

(B. 2.) The Queen.

So, the queen of *England* may sue by writ, without naming the king. *Tb. D. l. 1. c. 4. Co. Lit. 133. a.*

As, in a *quare impedit*. *18 Ed. 3. 1. b. Tb. D. l. 1. c. 4. f. 1.*

In a *parco fracto*. *F. N. B. 101.*

And, if the ground of the action by the queen be a breach of the peace, the writ shall say, *pone per vad. &c. A quod sit, &c. ad respondendum tam nobis quam Anna regina Anglia.* *F. N. B. 101.*

So, the queen may exhibit an *English* bill in chancery by way of an information by her *attorney general*, to enforce or confirm a degree. *R. 2 Rol. 213. l. 10.*

The queen, in an action by herself, shall not find pledges. *F. N. B. 101. A.*

Nor, shall she be amerced, if there be judgment against her. *F. N. B. 101. A.*

(B. 3.) A Common Person.

So, the prince of *Wales* may sue by writ. *Tb. D. l. 1. c. 5. 1 H. 5, 7. b.*

So, every other subject of the king. *Vide 2 Infl. 55, 56.* who has no legal impediment; of which *vid. Abatement.* (E. 1, &c.)

So, an *alien enemy*. *Vide Abatement.* (E. 4.)

So, a body politic, sole or aggregate, spiritual or temporal.

So, an idiot, lunatic, &c. shall sue in his own name. *Poph. 141. 1 Brownl. 197.*

So, the inhabitants of a hundred may have debt, or a *scire facias*, upon a judgment for them in an action against the hundred for costs; for the statute which enables them to be sued, enables them to sue for costs, if the judgment be for them. *R. F. g. 296.*

[A foreign trading company (as the *Dutch West-India Company*) may sue by their name of reputation: *Dutch West-India Company v. Henriques, M. 11 G. Str. 612.*]

Who cannot sue.

Vide in Abatement, to the Ability of the Person, (E. 1, &c.)

(C) Who may be sued.

(C. 1.) The King.

UNTIL the time of *Edw. 1.*—The king might have been sued in all actions, as a common person. *22 Ed. 3. 3. 43 Ed. 3. 22. Dub.—St. Pra. R. 42. Tb. D. l. 4. c. 1. f. 3.* And the form was, *Præcipe Henr. Regi Angl. &c.* *24 Ed. 3. 23. [55. b.] Tb. D. l. 4. c. 1. f. 3.*

But

But now, none can have an action against the king; but one shall be put to sue to him by petition. *Tb. D. l. 4. c. 1. Vide Prærogative, (D. 78.)*

So, no. one can vouch the king; for that is in nature of an action. 3 *H. 7. 14. b. 9 H. 6. 3, 4. Tb. D. l. 4. c. 2. f. 2. R. Cro. Car. 96.*

So, if a fine be levied by the king of lands, it shall not be by writ of covenant, but by *render*. *Cro. Car. 97.*

(C. 2.) The Queen.

The queen may be sued without the king her husband in all actions; for she is a person *sole* by the common law. 11 *H. 4. 67. b. Tb. D. l. 4. c. 2. f. 1.*

And may be vouched. 3 *H. 7. 14. b. Tb. D. l. 4. c. 2. f. 2.*

So, the queen dowager may be sued by action, without suing to her by petition. 10 *Ed. 3. 508. [26. b.] 9 H. 6. 12. 11 H. 6. 32. Tb. D. l. 4. c. 2. f. 3.*

(C. 3.) A Common Person.

So, the prince of *Wales* may be sued by writ. *Tb. D. l. 4. c. 2. f. 4.*

And, every subject of the king, ecclesiastical or temporal, man or woman, villein or free. 2 *Inst. 55, 6.*

Though he be deaf, dumb, or an idiot. *Tb. D. l. 4. c. 2. f. 4.*

Though he be *non compos mentis*, lunatic. *Ibid.*

Though he be a leper. *Ibid.*

Though he be convicted or attainted. *R. Noy. 1. Tb. D. l. 4. c. 2. f. 4.*

[Though a person attainted is liable to civil suits, yet he ought not to be charged but by leave of the court, or of a judge at his chambers. *Macdonald's case, 1747. Foster 61.*]

[If a person attainted of high treason is charged in custody in a civil action by leave of a judge, there cannot be a motion to discharge him from custody, on the king's pardon, on condition of transporting himself; the first step must be, to move to discharge the judge's order. *S. C. 1 Wilson. 217.*]

Or, outlawed. 2 *Inst. 56. Tb. D. l. 4. c. 2. f. 4.*

Or, excommunicated. *Ibid.*

Or, within age. *Ibid.*

So, every body politic may be sued.

Or, an *alien* born.

But, a man professed ought to be sued with his sovereign, a villein with his lord, and a *feme covert* with her husband; of which *vide Abatement (F. 1, 2, 3.)*

(D) The Diversity of Actions.

(D. 1.) *Placita Coronæ.*

THERE are two kinds of actions; *placita coronæ, et civilia*. *Co. Lit. 284. b.*

Pleas of the crown are those, which contain offences done against the crown, and dignity of the king. *St. P. C. 1. a.*

(D. 2.)

(D. 3.) A personal action is such as concerns the person only, by
 Personal. which nothing but damages can be recovered. *Bras.* 102.
Jon. 214.

When a personal action dies with the person, and when not,
Vide in Administration, (B. 13.)—*Trespas*, (B. 5.)

(D. 4.) Mixt actions are those, in which the freehold is recovered,
 Mixt. and also damages. *Co. Lit.* 284. *b.*

As, in assise of *novel disseisin*. *Co. Lit.* 285. *a.* *Lit. Sect.*
 494.

Quare impedit, and *darrein presentment*. *Lit. Sect.* 493.

Curia claudenda, which lies against the tenant of the freehold,
 for not inclosing his land, to the nuisance of the plaintiff; and the
 judgment shall be, that he inclosed the land and render damages.

Warrantia chartæ, in which the plaintiff shall have judgment
 for the warranty, and also for damages.

Wast. *Lit. Sect.* 492.

Writ of annuity. *Co. Lit.* 285. *a.* *Cont. R.* *Jon.* 214.
Cro. Car. 171. *Ejectione Firme.*

(E) An Action does not lie before a Cause of Action accrued.

AN action does not lie before a cause of action accrued.
 When this may be pleaded in abatement, *Vide Abate-*
ment (G. 6.)

And, if it be not pleaded in abatement, yet if it appears upon
 the record, it may be moved in arrest of judgment. 2 *Lev.* 197.
Carth. 114. *Vide Sho.* 147.

Or, assigned for error; as, in debt upon an obligation pay-
 able at *Mich.* and the original was teste'd 15th *Sept.* returnable
Octab. Mich. and because the original was teste'd before the
 cause of action, the judgment was reversed. *R. Cro. El.* 325.
Vide 1 Leo. 186.

So, in *assumpsit*, where the plaint was entered 16th *May*, upon
 a promise on the 4th *May*, to pay 19th *May*. *R. 2 Cro.* 70.
Tel. 70.

So, where the plaintiff declared, that the defendant 23d
Dec. assumed; where it appeared, that the promise was made
 23d *Dec.* to pay 23d *January*. *R. Cro. Car.* 575.

That the defendant promised to pay 30 *shillings* a year for an
 house, and the plaintiff demands 45 *shillings* for a year and an
 half; for he cannot demand for a year and an half; for it is pay-
 able *annuatim*; and if intire damages are given, it is void for the
 whole. *R. Lit.* 61. (a)

So, in *ejectment*, if *ouster* be alledged after the *teste* of the
 original. *R. Jon.* 304. *Cro. Car.* 272, 282.

(a) In this case, if he had brought his action generally for use and oc-
 cupation, and recovered the year and a half's rent, it would have been
 well. *Morgan's Vade Mec.* 17.

So,

Civil actions are real, personal, or mixt. *Co. Lit.* 284. b.

Every real action is *possessory*, viz. of his own possession or seisin; or *auncesrel*, viz. of the

And real actions *auncesrel* are *possessory*, viz. when the ancestor dies in possession, and the

- Properly so called :
1. Right *patent* lies by a tenant in fee for lands and tenements only, manding him to do right in his court. *Vide Droit*, (B. 1.)
 2. Right *quia dominus remisit curiam*, where upon such a suggestion,
 3. *Præcipe in capite*, which shall be returned in *C. B.* where the land
 4. Right in *London*, when the land lies in *London*. *Vide Droit*, (
 5. Right of *advowson* lies for an *advowson*, by him who has the fe
 6. Right *de rationabili parte* lies by one parcener, &c. in fee, again
 7. Right of *dower* lies to the heir, or feoffee of the husband, to do rig
 8. Right *close*, for lands in *ancient demesne*, which are pleadable only

1. Writs of *right*,
which are either

[*Vide Droit.*]

Or in nature of a writ of right.

1. Right upon a *disclaimer* lies by the lord for the land, which th
2. *De rationabilibus divisis* lies for dividing lands by metes between
3. Right of *ward* lies for the lord, where his tenant dies in his
4. Of *customs and services* lies for the lord, when his tenant defor
5. *Cessavit* lies by the *stat. W. 2.* 21. for the land, where the t
6. *Escheat* lies, when a tenant in fee dies without heir. *Vide in*
7. *Nativo habendo* lies for a villein by him who has the inheritanc
8. *Quo jure* lies by him who has the fee in the land, against him
9. *Setta ad molendinum* lies for refusing to grind at his mill, as he
10. *Ne injuste vexes* lies for a tenant, when the lord, without coe
11. Writ of *mesne* lies for the tenant *paravail* to be acquitted, wh
12. *Dower unde nihil habet* lies by the wife for her dower. *Vide*
13. *Quod permittat* lies to have common, remove a nuisance, &c.
14. *Formedon* lies for tenant in tail, and may be

{ In descender,
remainder,
reverter, &c.

1. Upon *disseisin*.

{ In the *quibus*, or in nature of an assise. *Vide*
In the *per*, when the tenant claims by him who
In the *per* and *cui*, when he claims in the second
In the *post*, when he claims after all the degrees

2. Writs of *entry*,
which lie in the *per*,
the *per et cui*, or the
post, and are

2. Upon *intrusion*.

{ When any intrudes after the death of the party
Or intrudes, or detains after a term expired, w
Or detains land given *causâ matrimonii prælocuti.*

[*Vide dum fuit infra*
statem.]

3. Upon *alienation*.

{ By a person incapable; as, an idiot, infant,

{ By a particular tenant { *Ad communem legem*,
By *stat.* as { *In casu*
In consimili

{ By the husband of his wife's estate. { *Cui in vita. Vide*
Sur cui in vita; fo
Cui ante divortium.
Sur cui ante divorti

3. Writs *auncesrel* pos-
sessory; as
[*Vide Affise.*]

{ *Mort d'ancestor*, which lies when the immediate ancestor dies seise
Aiel, which lies for the heir upon an abatement after the death of
Besaiel, which lies after the death of the great grandfather.
Cosinage, upon the death of any other collateral cousin.
Nuper obiit, which lies, when one parcener, after the death of the

Civil Action.

rel, viz. of the possession or seisin of his ancestor. 6 Co. 3. *Markal*.
 ion, and the land descends; or *rightful*, when only the right descends from the ancestor. 6 Co. 3. b.
 ements only, and shall be directed to the lord or bailiffs of the manor of which the land is *held*, com-
 t, (B. 1.)
 suggestion, the writ is directed to the sheriff returnable in C. B. *Vide Droit*, (C. 2.)
 here the land is held of the king in *capite*. *Vide Droit*, (C. 1.)
Vide Droit, (D.)
 o has the fee. *Juris utrum* lies for a parson, &c. *Vide in quare impedit*, (B. 1, 2.)
 n fee, against the other, who enters into the whole. F. N. B. 9. B.
 nd, to do right in his court to the wife, when she has only had part of her dower. *Vide Dower*, (G. 1.)
 eadable only in the court there. *Vide Ancient Demesne*, (G. 1, &c.)
 d, which the tenant disclaims to hold of him. *Vide Droit*, (F.)
 etes between two adjoining vills. *Vide Droit*, (L.)
 dies in his *homage*, and a stranger seizes the body, or land of the ward. *Vide Guardian*, (H. 1.)
 tenant deforces him of his rent, or other services. *Vide Droit*, (G.)
 where the tenant ceases two years, and there is no distress for the services. *Vide Cessavit*.
 . *Vide in Escheat*.
 e inheritance, when he flies out of the manor. *Vide Villenage*, (C. 1, 2.)
 against him who claims common there. *Vide Quo jure*.
 mill, as he ought by tenure, or prescription. *Vide Droit*, (H.)
 without coercion, has seisin of greater services. *Vide Droit*, (I.)
 quitted, when he is distrained by the lord *paramount*. *Vide Droit*, (K.)
 wer. *Vide Dower*, (G. 2.)
 fance, &c. *Vide Quod permittat*.
 descender, F. N. B. 211. L.
 remainder, F. N. B. 217. D.
 reverter, F. N. B. 219. E.
 ife. *Vide dum fuit infra etatem*, (H.)
 by him who made the disseisin.
 n the second degree.
 the degrees.
 of the particular tenant. F. N. B. 203. E.
 expired, which is called *ad terminum qui præterit*. F. N. B. 201. D.
 iii prælocuti. F. N. B. 205.
 eot, infant, &c. { *Dum non fuit compos mentis*. *Vide dum fuit infra etatem*, (B.)
 { *Dum fuit infra etatem*. *Vide dum fuit infra etatem*, (A.)
 nem legem, which lies after the death of the tenant. F. N. B. 49. D. F. 220.
 s { *In casu proviso* by the stat. Glo. 7. in the life of the tenant in dower. *Vide dum fuit infra etatem*, (D.)
 { *In consimili casu* by the stat. W. 2. 24. in the life of any other particular tenant. *Vide dum fuit atatem*, (E.)
 vita. *Vide Baron and Feme*, (I. 3.)
 in vita; for the heir of the wife.
 e divorcium. *Vide dum fuit infra etatem*, (G.)
 ante divorcium.
 or dies seised, and a stranger abates. *Vide Affise*, (C. 1, &c.)
 he death of the grandfather. } *Vide Affise*, (D.)
 her. }
 eath of the ancestor, enters and ousts the other. *Vide Affise*, (E.)

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So, in debt upon a bond for performance of covenants; if a breach be assigned for a time after the action commenced, it will be bad. *R. 1 Sid. 307.*

So, in debt upon a bond for payment of money, which becomes due before plea; if it be after action commenced, it is bad. *Semb. Cont. 1 Sid. 308.*

So, in covenant by an assignee, he cannot recover for a breach before the assignment. *R. Leo. 51.*

So in trespass for taking of tithes, which the plaintiff claims in right of his wife; if upon the evidence the taking appears before the marriage, the plaintiff shall be nonsuited. *R. 1 Leo. 104.*

So, in *quare impedit* upon a disturbance, if the writ be *9th May*, and by the replication it appears, that the disturbance was *29th May*, the plaintiff shall not have judgment. *R. Hob. 198.*

So, in an action upon the case for a malicious indictment, upon which he was acquitted *30th Oct.* where the memorandum was, *quod alias scilicet term. Sancti. Mic.* which relates to the first day of *Michaelmas* term, *viz. 23d Oct.* and therefore bill was before the cause of action. *R. Carth. 114.*

So, in an information for usury in *Michaelmas* term, the defendant pleaded, *quod ante exhibitionem hujus informationis, viz. eodem termino, M.* another person exhibited another information and had judgment thereon; and the plea was bad; for both the informations were at the same time. *R. 2 Lev. 141.*

* Otherwise, as it seems, if the defendant set out the days on which each bill was exhibited, by which the court may judge of the priority. *Str. 1169. Vide 3 Bur. 1434. **

And, this error is not aided by the *stat. 18 Eliz. c. 14.* after verdict, though the want of an original would have been aided. *R. Cro. El. 325. R. Cro. Car. 272, 282, 575. R. Sho. 147. Jon. 304.*

So, if a bill be entered to be filed at a day before the cause of action; after error brought for this cause, the court will not amend the entry, that it may be according to the judgment. *4 Mod. 367. * Qu.* Whether the present liberality of the courts in favour of right and justice would not, at this day, induce them to allow an amendment on payment of costs. *Morgan's Vade Mecum, vol. 1. 18. **

But if the process is returnable after the cause of action, though it bears *teste* the last day of the preceding term, which was before the cause of action, it is not error. *R. 2 Cro. 561.*

So, if the *latitat* be teste'd before the cause of action, if the plaintiff does not declare before. *R. 2 Mod. Ca. 343. * Foster v. Bonner, Cowp. 454. **

* In the common pleas, the suing out of the original is the commencement of the action, in the king's bench the exhibition of the bill, which, though seldom filed, is that, of which the declaration is supposed to be a copy; the bill of *Middlesex* or *latitat* is only process to bring the party into court, and the

the time of the suing it out is not, in *general*, material, if a cause of action arise before the declaration. *Cowp.* 455. *

* But if the defendant plead that before the exhibiting of the bill, the statute of limitations had run, the plaintiff may reply that before the statute had run, *sc.* on such a day he sued out a *latitat*; but if the plaintiff alledge that he *sued out a latitat* according to the course of the court before the expiration of six years, &c. the defendant may rejoin and *shew* the very day of suing out the writ which was after the six years had expired. 2 *Bur.* 962. *

* But to bring the case within the equity of the law, the *latitat* must be taken out with intent to declare in that action, and must be continued to the filing of the bill. *Ibid.* 961. *

* So if the defendant plead a tender before the exhibition of the bill, the plaintiff may reply that before the tender, *sc.* on such a day, he sued out a *latitat*. *Ibid.* 963. *

* But if the tender was actually before the suing out of the *latitat*, although subsequent to the teste, it is good. *Ibid.* *

* So also in actions on penal statutes if the writ of *latitat* be actually sued out within the time given by the statutes, that is a sufficient commencement of the action to save the bar; but in none of these cases is the teste sufficient. *Ibid.* 964. *

* But though a *latitat* may be taken out *before* the cause of action, yet the party cannot be arrested on it, till *after*; and the court will discharge the arrest. *

* And if a man be taken in the vacation by warrant *without writ*, and a *latitat* be procured tested in the preceding term, it shall not discharge the wrong done *after* the teste, and before the actual taking out of the writ; but the plaintiff in an action for false imprisonment may take issue *when* it was prosecuted in truth. *Ibid.* 963. *Vide* 2 *Bur.* from 950 to 968. *Cowper* 454 to 457. *Dougl.* 61, where the whole subject is considered at full length. *

So, if the declaration be *de termino Pasche*, and the cause of action did not accrue till the first day of that term; it is not error, if the bill was filed afterwards. 2 *Lev.* 176.

So, if the declaration be *de termino Pasche* generally in *B. R.* and not of a day certain in the term, as it may, which relates to the first day of the term, and the cause of action accrues after the commencement of the term; yet if bail was not filed 'till the cause of action accrued, it is not error; for the cause is not depending 'till the defendant is *in custodia mareschalli*, or 'till the filing of bail. *R.* 2 *Lev.* 13. 1 *Vent.* 135.

So, if an ejectment be *de termino Pasche* in *B. R.* and the demise alledged at a day after the commencement of the term; it is good, if the bill was not then filed. *R.* 1 *Sid.* 432. *Vide* 1 *Vent.* 135.

* If declaration in ejectment as of *Trinity* term, be delivered before the essoign day of *Michaelmas* term, and the demise be laid on a day after the expiration of *Trinity* term, it is immaterial, for if judgment go by default, no one can take advantage of

of it; if the tenant appear, he must enter into the common rule to confess lease, entry and ouster, when the issue is made up, as of *Michaelmas* term, by the attorney for the lessor of the plaintiff, on the plea of not guilty, the only plea the tenant can plead, and then the demise appears to be before the suit is commenced, for the declaration served was merely in the nature of process, to bring the tenant into court, and does not appear on the record, any more than a bill of *Middlesex* or *latitat*. *Morgan's Vade Mec.* 19.*

And it may be examined, *when* the bill or bail was filed. *Mod. Ca.* 33. 1 *Sid.* 432.

[So in assault and battery, if the memorandum is of *Michaelmas* term generally, and the fact, on plea of *son assault*, &c. proved, is within the term, it is well enough. *Guy v. Kitchiner*, T. 21 G. 2. *Str.* 1271. S. C. by the name of *Hay v. Kitchin*, 1 *Wilf.* 171.]

So, if a declaration in ejectment in *R. B.* be *de termino Mich.* and the demise is alledged 30th *Oct.* but the original not teste'd 'till 2d *Nov.* it is good. *Semb.* 2 *Vent.* 174. *Vide* 1 *Vent.* 135.

So, if in trespass the *continuando* be to the middle of the term, if the bill was afterwards filed. 1 *Vent.* 264.

Otherwise, if the *continuando* be carried after the end of the term. *R.* 1 *Vent.* 264.

So, in covenant by an heir, if the breach be, that there was no repair such a day, nor ten years before, which goes to the time of his ancestor, it is not error; for out of repair at that day, is all that was material, and the ten years before, frivolous. *R.* 1 *Sal.* 141.

So if the defendant alledge a matter, which shews the action brought before a cause of action accrued, which is not relied upon, but the plaintiff pleads over, and issue is joined upon a collateral point, it will not be error. *R.* 2 *Leos.* 20. *Cro. El.* 110, 68, 9. *Vide in Pleader*, (C. 85.)

[Quashing of a writ is not *ex debito justitiæ*, and therefore though the cause of action appears on the face of the *capias*, to arise after the *teste*, the court will not quash it, but give plaintiff opportunity to set it right if he can, by filing a bill as of next term. *Andrews v. Dingley*, M. 4 G. 2. *Str.* 877.]

* In some cases, certain things are required by act of parliament to be done, by the plaintiff previous to the commencement of an action, or he cannot recover, and the defendant need not plead the omission; as in actions against justices of peace, for any thing wrong done in the execution of their office, a month's notice of the intended action must be given, which if not done, the justice may plead the general issue, and be entitled to a verdict for want of notice. *Stat.* 24 G. 2. c. 44. *Vide Morgan's Vade Mec.* 20.

(F) *Not before the last Day.*

SO an action does not lie upon an intire contract for payment at several days, 'till the last day is past; as, if a man be bound by an obligation or contract, to pay 100*l.* at five several days, debt does not lie 'till the fifth day is incurred. *Co. Lit. 292. b. D. 3 Co. 22. a.* * This must be taken to be meant of a single bond; for *

[If bond is conditioned to pay money at several times, it becomes absolute by not performing any of the payments. *Coates v. Hewitt, M. 18, 2. Hallet v. Hodges, P. 25 G. 2. Wilf. 80.*]

If a man lease a stock of cattle or goods for years, rendering rent at several days, debt does not lie, 'till all the days be incurred. *3 Co. 22. a. Walker.*

But it will be otherwise, if the contract be several in its nature; as if a man lease land, rendering rent at several days, debt lies after each day: for the rent issues out of the land, and the contract follows the land. *Co. Lit. 47. b. 292. b. 3 Co. 22. a.*

So, if lessee for years assign his term to him in the reversion, rendering rent, which is a surrender, and the rent not good by way of reservation, but by way of contract, yet debt lies after each day. *R. 2 Lev. 80. 1 Vent. 242, 272.*

Or, if the remedy is several in its nature; as, if a man be bound by a recognizance to pay 100*l.* at five several days, he may sue execution for each sum after each day; for it is in the nature of several judgments. *Co. Lit. 292. b.*

Or, agree, if he fails of payment at the first day, that he will pay the whole. *R. 1 Leo. 208. R. 2 Mod. Ca. 56, 7.*

So, if a man covenants to do a thing at several times, covenant lies upon every default. *Co. Lit. 292. b.*

So, if there be debt upon a bill, whereby a man agrees to pay 5*l. per annum*; it may be after the first year. *R. 3 Lev. 383.*

So, if he contract to pay at several days, an *assumpsit* lies for non-payment, after the first day. *Co. Lit. 229. b. R. cont. 3 Leo. 4.*

As, upon a bargain, to deliver 20 *quarteria tritici* every year during his life; though debt does not lie, yet an *assumpsit* lies for default at the first year. *4 Co. 94. b. Dy. 113. a.*

Upon an agreement to pay 4*l.* by 5*s. per mensem*, an *assumpsit* lies upon a default each month. *R. per three J. 2 Cro. 504.*

[On a note of hand for paying money by installments, action lies for every default of payment; and he shall count only for the money due, and not for the whole money. *Absford v. Hand, P. 12 G. 2. Andr. 370.*]

Upon an agreement for 30 tons of strong beer, and to pay 4*l.* for each ton, an *assumpsit* lies for the 4*l.* for so many tons, when they are delivered. *R. 1 Rol. 29. l. 30.*

Upon an agreement to pay 15*l.* yearly for four years, if *A.* enjoy such land, an *assumpsit* lies for each year that *A.* enjoys, before all the years are incurred. *R. Cro. El. 118. R. 23 Car. 1 Rol. 30. l. 5.*

Upon

Upon an agreement to pay 100*l.* upon a marriage, viz. 20*l.* at such a day, and 20*l.* &c. an *assumpsit* lies after each day. *D. to be so R. Cro. El. 118. Mo. 13. cont. R. acc. sapius, 1 Rol. 29. l. 20. 35. R. Cro. El. 776, 807. R. 2 Sand. 337.*

Upon a promise to pay rent *annuatim* at *Mich.* and *Annunciation*, *assumpsit* lies after each feast. *R. 2 Leo. 107.*

So, if there be a contract to deliver so much corn before *Mich.* for so much the comb, to be paid at the delivery of the last corn, and he delivers only part of the corn; yet an *indebitatus assumpsit* lies for so much after *Mich.* for though the agreement was intire, the several delivery makes several contracts, and the defendant has a remedy for the residue. *Per Hale, at Norfolk ass. 1662. between Baker and Sutton.*

And damages given in an *assumpsit* upon the first default, are no bar in an *assumpsit* upon a default at the other day; for they shall be intended all for the default at the first day. *2. Dy. 113. R. Cro. Car. 241. 1 Rol. 29. l. 40. D. 2 Sand. 337.*

But, if the jury give the intire sum in damages, with an averment, that it was for the whole, it will be a bar to another *assumpsit* upon the same promise. *R. 2 Cro. 505.*

(G) The Law does not allow one Action, upon Several and Distinct Causes of Action.

A Man cannot join several, and distinct causes of action in the same count, or declaration.

When this may be pleaded in abatement. *Vide Abatement, (G. 4.)* And for duplicity in the declaration. *Vide Pleader, (C. 33.)*

And therefore a writ of entry does not lie upon a *disseisin* of two ancestors. *31 H. 6. 14. 2. Th. D. l. 10. c. 14. f. 11.*

In all real actions founded upon a title; as, in *escheat, cessavit*, writ of *mesne, formedon in descender, remainder, or reverter*, &c. the demandant cannot join lands, accruing by two several tenures, or by two several gifts, in the same writ. *R. 8 Co. 86. b. Buckmere.*

So, it is bad, if a man sue one *attaint* against two several inquests. *25 Ed. 3. 42. [85. a.] Th. D. l. 10. c. 15. f. 1.*

Or join ejectment of ward, and trespass in the same declaration. *Th. D. l. 10. c. 15. f. 1. Semb. 5 Mod. 91.*

So, a man cannot join actions founded upon a *tort*, and upon contract in the same declaration; for they require different process, and different pleas. *Dan. 3. ** But the true reason why an action may, or may not be joined, is not the difference of the defendant's pleas, for then a debt on obligation, and a *mutuatus* could not be joined; but the proper reason seems to be the difference of the process and the fine on the original, as also the difference of the judgments. *Gilb. C. P. 7. **

As, an *assumpsit*, and an action upon the case founded upon fraud, or deceit. *R. Carth. 189.*

So, if a man join *assumpsit* and *trover* in the same declaration. *R. 2 Lev. 101. R. 3 Lev. 99. Semb. Ray. 233.*

If husband and wife join in an action for the battery of both. *9 Ed. 4. 54. [51.] Tb. D. l. 10. c. 15. f. 24.*

Or, in trespass for goods of the wife taken before the coverture, and goods of the husband taken afterwards. *21 H. 6. 33. [30.] Tb. D. l. 10. c. 15. f. 24.*

So, if a man join an action upon the common custom of the realm against a carrier, and *trover* in the same declaration. *R. Pasch. 7 W. 3. between Sir J. Dalston and Janfon. 1 Sal. 10. 5 Mod. 91. Vide cont. infra. Dan. 4.*

So, if husband and wife join in an action for the battery of the wife, and taking the goods of the husband. *R. 2 Lev. 20.*

So, a man cannot join an action in his own right, and an action as executor, or administrator. *R. Hob. 88. Dan. 4. Vide infra. Adm. 2 Lev. 110. R. cont. 2 Lev. 228.* for the judgment is the same for both, and what he recovers as executor, or administrator will be assets. *R. acc.* for the damages are intire, and it cannot be known how much shall be assets. *1 Sal. 10.*

A plaintiff shall not have an action against another, to charge him as executor or administrator, and also in his own right; for the judgment in the one case shall be *de bonis testatoris*; in the other, *de bonis propriis*. *2 Lev. 228. Semb. Mo. 419. R. Hob. 88. Adm. Cro. El. 406.*

So, a man cannot have one *scire facias* to reverse several outlawries. *29 Ed. 3. 43. [33. b.] Tb. D. l. 10. c. 15. f. 4.*

So, a man cannot join an action at common law, with an action founded upon a statute. *Jenk. 211.*

[Two actions by the same plaintiff, one against a man and his wife, for words spoken by the wife, the other against the man only, for words spoken by him, cannot be consolidated. *Swithin v. Vincent, P. 4 G. 3. 2 Wils. 227.*]

But if, in an action by husband and wife for the battery of both, the defendant is found not guilty as to the husband, the declaration is aided by the verdict. *Per Bridgman, Hard. 166. Dxb. 2 Cro. 655. R. 2 Vent. 29. Vide Pleader, (C. 87.)*

So, in a declaration upon *assumpsit*, and *trover*, if the defendant be found not guilty as to the *trover*, it is aided by the verdict. *Dub. 2 Lev. 101. R. cont. 3 Lev. 99.*

So, in an action against a common carrier upon the custom of the realm, and *trover*, if he be found not guilty for the *trover*. *R. in E. B. Pas. 5 Ann. Vide supra et infra.*

So, in an action by an administrator upon a promise to the intestate, and another promise to himself; after verdict and intire damages, it shall be intended, that the other promise was made to him as administrator. *R. per three J. Twissden cont. 2 Lev. 110.*

And in real actions, the demandant may join several titles, which stand upon the same foundation, in one action: as, a man shall

shall have a *formedon in reverter* or remainder, for lands which accrued after several entails, and at several times, if they are created and limited by the same deed. *R. 8 Co. 87. a.*

So, in real actions founded upon a *tort*, the demandant may sue for lands, which come by several titles, in the same action: as, he may have a writ of right, or a writ of entry in the nature of an assise, for lands which come from several ancestors. *R. 8 Co. 87. b.*

Or, an assise. *8 Co. 87. b.*

So, in personal actions, if two causes of action are of the same nature, they may be put in one action: as, an assise lies for several rents upon several titles. *Tb. D. l. 8. c. 26. f. 1, 2. Vide Dan. 3.*

[All counts whereon there is the same judgment, may be joined in one declaration, though they require different pleas. *D. of Bedford v. Alcock, T. 22 & 23 G. 2. 1 Wilf. 248. Dickon v. Clifton. M. 7 G. 3. 2 Wilf. 319.*]

[So, if on an agreement that *A.* may build a yard for landing goods in *B.*'s close, *B.* obstructs him, he may declare in trespass and in *trover*. *Mast v. Goodson, M. 13 G. 3. 3 Wilf. 348. Beau v. Bloom, M. 14 G. 3. 3 Wilf. 456.*]

So, annuity lies for two several annuities. *Tb. D. l. 8. c. 25. f. 3.*

So, an *assumpsit* lies by an administrator for a debt due to himself, and a debt of the intestate upon an *infirmul computasset* with himself. *R. per three J. Twisden cont. 2 Lev. 110. R. 2 Lev. 228. Dan. 4. Cont. Sho. 366.*

So, an action upon the case lies for words, and for a malicious indictment. *Hob. 6.*

So, an action upon the statute of labourers, lies against the master who retains, and the servant who departs out of his service. *28 Ed. 3. 97. [21.] 29 Ed. 3. 7. [5.] Tb. D. l. 10. c. 15. f. 2.*

So, *replevin* lies upon several distresses, at several days and places. *Tb. D. l. 10. c. 15. f. 3. 10 Ed. 3. 508. 29 Ed. 3. 30. [23.]*

So, trespass lies for several trespasses at several places and times. *8 Co. 87. b. 3 H. 6. 53. [52.] Tb. D. l. 10. c. 15. f. 21, 22, 23.*

Or, debt for rent upon several leases. *8 Co. 87. b. Vide Dan. 3.*

So, waste upon several leases. *8 Co. 87. b. Vide Dan. 1.*

One ravishment of ward, for the ravishment of two daughters. *Tb. D. l. 10. c. 15. f. 7.*

One *decies tantum*, against jurors and embracers. *41 Ed. 3. 9. b. Tb. D. l. 10. c. 15. f. 8.*

One conspiracy, for two several acts of conspiring. *Tb. D. l. 10. c. 15. f. 11.*

One *audita querela* upon two several matters. *Tb. D. l. 10. c. 15. f. 13, 14.*

One action upon the case, for several disturbances and trespasses. *Tb. D. l. 10. c. 15. f. 15.*

So,

So, if a man join *assumpsit* and *trover* in the same declaration. *R. 2 Lev. 101. R. 3 Lev. 99. Semb. Ray. 233.*

If husband and wife join in an action for the battery of both. *9 Ed. 4. 54. [51.] Th. D. l. 10. c. 15. f. 24.*

Or, in trespasses for goods of the wife taken before the coverture, and goods of the husband taken afterwards. *21 H. 6. 33. [30.] Th. D. l. 10. c. 15. f. 24.*

So, if a man join an action upon the common custom of the realm against a carrier, and *trover* in the same declaration. *R. Pasch. 7 W. 3. between Sir J. Dalfon and Janson. 1 Sal. 10. 5 Mod. 91. Vide cont. infra. Dan. 4.*

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[So, if on an agreement that *A.* may build a yard for landing goods in *B.*'s close, *B.* obstructs him, he may declare in trespass and in *traver.* *Mast v. Goodson, M. 13 G. 3. 3 Wilf. 348. Beau v. Bloom, M. 14 G. 3. 3 Wilf. 456.*]

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One action upon the case, for several disturbances and trespasses. *Th. D. l. 10. c. 15. f. 15.*

So,

So, a man shall have an action for taking goods in the highway contrary to the *stat. of Marlh. 15.* and for taking goods and detaining them 'till a fine made in the same declaration. 39 *Ed. 3. 25.* [20.] *Th. D. l. 10. c. 15. f. 10.*

So, an action upon the *stat. 8 H. 6.* for a forcible entry, and a forcible detainer. *Th. D. l. 10. c. 15. f. 19.*

So, a man shall join debt upon bond, and upon contract, in the same declaration. *Th. D. l. 10. c. 15. f. 9. D. 1 Vent. 366.*

Debt upon bond, and upon judgment. *Lut. 43.*

[Debt on an amercement in the leet founded on a presentment, and on a *mutuatus*, may be joined. *Duke of Bedford v. Alcock, T. 22 & 23 G. 2. 1 Wilf. 248.*]

So, he shall join *detinue* for charters, and for chattels. *Th. D. l. 10. c. 15. f. 6.*

So, debt, and *detinue*. *Th. D. l. 10. c. 15. f. 6, 16. 5 Mod. 91.*

So, *trover* and an action upon the common custom of the realm against a carrier for goods lost. *Per Hale, 1 Vent. 223. R. 1 Vent. 365. Vide supra contra.* * For they are of different natures, the one being on a contract, the other on a *tort*. *

[Action for misfeasance (as an action against a common carrier for spoiling goods) and *trover* may be joined. *Dickon v. Clifton, M. 7 G. 3. 2 Wilf. 319.*]

So *trover*, and an action upon the case for the abuse of an horse. *Adm. Lut. 101. R. Cro. Car. 20. D. 5 Mod. 91.*

So, a general trespass and an action upon the case. *R. Al. 9.*

A fortiori, if in trespass a conversion be alledged for aggravation. *R. Lut. 1526. R. Sho. 180. Carth. 113.*

So, trespass for a battery of the servant, *per quod servitium amissit*, and an action upon the case for keeping a dog accustomed *ad mordend. oves.* 5 *Mod. 91.*

So, if a man has in himself distinct titles, he may have one action for a *tort* to both; for he does not declare upon his title: as, a farmer of tithes by distinct leases, two parts by one, and the third part by the other, shall have an action upon the *stat. 2 Ed. 6.* for not setting out his tithes. *R. Yel. 63. 1 Brownl. 86. 2 Cro. 68. Mo. 914.*

So, actions for several causes in the same declaration will be aided by verdict. *R. Carth. 189. Vide supra.*

(H) Of Circuity of Action.

SO the law abhors circuity of action; and therefore, if an administrator recover in *trover*, and then the administration is repealed, the defendant shall have an *audita querela*, to avoid the circuity of action, if the plaintiff was to sue execution against him, and then the new administrator was to have an action against the plaintiff for the money recovered. *R. 2 Sand. 149.*

So, if a man, upon the credit of *B.* lend money to *A.* which is applied to the use of *A.* but is not put to account by *A.* upon an account made between him and *B.*—The lender shall have

an account in chancery against *A.* for avoiding the circuitry of action, if he was to be put to his action against *B.* and *B.* to an action against *A.* *R. in chanc. and upon appeal affirmed in parliament. Ca. in. P. 17.*

But, a cause of action against a plaintiff will be no bar to an action by him for avoiding circuitry of action, when the recovery in both actions is not equal: as, in waste, it is no bar, that the plaintiff covenanted to repair; for in waste he shall recover treble damages, in covenant only single. *Mo. 23.*

(I) Nor two Actions for the same Cause.

SO an action does not lie twice for the same cause; and therefore, if a man be twice prosecuted for the same crime, *auterfoits acquit*, or *auterfoits convict*, or *attaint* is a good bar. *Vide Appeal, (G. 9. 11.)*

So, if two actions are commenced for the same cause, it may be pleaded to the one, that another action is depending; *de quo, vide in Abatement, (H. 24.)*

[But judgment in *trover* for defendant is no bar to action against him for money had and received to plaintiff's use. — *v. Campbell, T. 11 G. 3. 3 Wils. 240.*]

[But plaintiff having right of action of *trover*, or of action for money had and received, and making his election by bringing *trover*, if there is judgment for defendant in that, plaintiff is barred from action for the money for which the goods were sold. *Kitchen v. Campbell. T. 12 G. 3. 3 Wils. 304.*]

So, if a stranger recover, pending another action for the same thing, that may be pleaded in abatement. *De quo, vide in Abatement, (H. 54.)*

So, satisfaction to one is a bar in an action by another for the same cause. *Vide post. (K. 1, &c.)*

[If two informations are exhibited the same day, for the same matter, both shall be set aside. *Adams v. Carter, T. 1716. Bunb. 9.*]

[If several actions of trespass are brought for the same cause against one defendant, the court will order plaintiff to join them all in one, if possible. *Stacey v. Sutton, T. 8 G. 2. B. R. H. 137.*]

[If *A.* bring one ejectment in *B. R.* and another in *C. B.* on the same title and for the same lands, the court will stay proceedings in one till he has discontinued in the other. *Thrustout v. Troublesome, M. 12 G. 2. Andr. 297.*]

[But if there are two declarations between the same parties, for different roads through the same close, to different parts of the same town, the court will not consolidate them. *Mynod v. Bridge, H. 16 G. 2. Str. 1178.*]

[If plaintiff, having recovered lands in ejectment, brings several actions against the several defendants, occupiers thereof, who are some small sums in arrear, the court will not order him to consolidate. *Stacey v. Sutton, T. 8 G. 2. B. R. H. 137.*]

(K) When

(K) When a Recovery in one Action is a Bar to another.

(K. 1.) In real Actions.

SO, in all real actions, if the demandant recover upon demurrer, confession, or verdict, &c. that will be a bar to such action for the same thing for ever. *6 Co. 7. a. Ferrers.*

As, a recovery, or bar in an assise is a bar in every other assise for the same cause. *6 Co. 7. b. 1 Leo. 24.*

Though the land be then named otherwise, if the plea was to lands put in view, and it be averred that the same land was put in view. *R. 1 Leo. 24.*

So, it will be a bar to another real action of the like nature. *6 Co. 7.*

As, a recovery, or bar in an assise, is a bar in a writ of entry in the nature of an assise; for both are of his own possession and of the same nature, between the same parties. *6 Co. 7. b.*

So, a bar in a writ of aiel, is a bar in a besaiel, or cosnage; for these are *ancestrel*, and of the same nature. *6 Co. 7. b.*

A fortiori, it will be a bar to another real action of a baser nature. *Th. D. l. 11. c. 28. f. 7.*

So, a *retraxit* entered, will be a bar to another action for the same cause. *Adm. Dal. 78. Cro. Car. 551.*

(K. 2.) In Informations.

So, in an information for usury, judgment in another information for the same usury, is a bar. *Semb. 2 Lev. 141.*

In an action by *qui tam*, &c. conviction at the suit of the king, is a bar. *Semb. Lut. 208.*

So, judgment in an action by another *qui tam*, &c. *Semb. Lut. 209.*

In an information for recusancy, a prior conviction for the same recusancy before justices of peace, or at the assises. *Win. Ent. 522, 524, 526. * Vide ante, (E.)**

(K. 3.) In personal Actions.

So, in personal actions, a recovery upon demurrer, confession, or verdict, &c. is a bar to every other personal action for ever; for no one personal action is of a higher nature than another; and therefore, the party has no remedy but by error, or attain. *R. 6 Co. 7. Cro. El. 667.*

As, in debt upon bond, if judgment be for or against the plaintiff, neither he nor his executors shall ever have an action upon the same bond, before or after execution, so long as the first judgment stands in force. *R. 6 Co. 45. 1 Sand. 91.*

Though a writ of error be depending of the first judgment. *R. 6 Co. 45.*

So, a bar in a personal action upon verdict, or demurrer, is a bar to another action for the same cause: as, a bar in trespass upon a demurrer, though in the former action there was bad pleading. *Semb. Lut. 1420.*

So, a recovery in a personal action in a court of *Westminster*, may be pleaded to an action for the same cause in an inferior court; as a recovery in debt upon a bond: for the record of the superior court may be removed by *certiorari* into chancery, and transferred by *mittimus* to the inferior court. *R. 1 Sand. 98.*

So, though the action be of another nature: as, a recovery in debt is a bar in an *assumpsit* upon the same contract, *et è contra.* 4 *Co. 94. b. Slade. Adm. Yel. 84.*

*So, where plaintiff, having a right to bring action on *assumpsit* for money had and received to his use, or a special action on the case on an agreement, makes his election by bringing an *assumpsit*, a recovery therein shall be a bar to an action on the agreement, though he might recover more on the agreement than on the *assumpsit*. *Per Lord Mansfield. 2 Bur. 1010.**

So, a bar in trespass, if the property be determined, will be a bar in *trover* for the same taking. *R. 2 Mod. 319, 320. Vide Pol. 634. Vide infra.*

A bar in *detinue* upon wager of law will be a bar in an action upon the case for mis-using the same goods. *Pol. 637.*

A bar in debt by wager of law will be a bar in an *assumpsit* for the same money. *Pol. 637.*

So, a recovery in ejectment, will be a bar in trespass: *R. 1 Leo. 313. 3 Leo. 194.*

So, a recovery in an action upon the case for erecting a nuisance, will be a bar to an action for erecting the same nuisance at a subsequent day: though the plaintiff might have had an action for the continuing of it. *R. 1 Sal. 10.*

[If defendant pleads (whether in bar or abatement) that another action was brought against him in the same term by another person for the same offence; it is not sufficient; he must shew the right of action was attached in another person before plaintiff's action commenced, he must set out the days on which the two actions commenced, *which in this case are the days on which the writs were respectively sued out.* *Combe v. Pitt, T. 3 G. 3. 3 B. M. 1423.*]

So, a recovery in an appeal of *maihem* will be a bar in trespass for the same battery. *Cont. 2 Rol. 570. l. 8.*

So, a recovery for a battery, in trespass for assault and battery, is a bar in an appeal of *maihem* for the same battery. *R. Mo. 268. 4 Co. 43. a. 1 Leo. 319. R. 1 Sal. 11. Vide infra.*

A recovery in trespass is a bar to *trover* for the same goods. *Semb. Ray. 472. et Cro. Car. 36. Cro. El. 668. Dub. Win. Ent. 61, 62. Vide supra, et infra.*

A recovery in *replevin* is a bar in trespass for the same taking. *Th. D. l. 11. c. 38. f. 39. 14 H. 7. 12. b.*

And a recovery in trespass is a bar in *replevin*. *Semb. 3 Lev. 124.*

So,

So, a bar in an action for words is a bar in another action for the same words, though they are then explained or interpreted. *R. 3 Lev. 248.*

So a recovery by a lessor in *trover* against a stranger for cutting down trees, will be a bar in waste against the lessee for the same cutting. *2. Al. 84.*

So, a bar in an assise upon the title, will be a bar in trespass. *R. Godb. 134.*

Otherwise, if the bar in the assise was upon the general issue, *nul tort. Godb. 134.*

So, though the recovery be founded upon a collateral respect; as, a recovery in debt upon the *stat. 2 Ed. 6. 13.* for not setting out tithes, is a bar in an action for the same tithes, though the recovery was not of the tithes themselves, but of damages for the contempt against the statute. *R. Tel. 63.*

A recovery upon a promise to pay money due upon a bond in an *assumpsit* is a bar in debt upon the same bond. *R. Tel. 84. R. Cro. El. 240.*

So, a recovery in trespass, or a bar, (*a*) will be a bar in *trover* for the same cause, though there were other parties. *Semb. Cro. El. 667, 8. R. Sho. 146. Vide supra.*

So, a recovery in assault and battery, will be a bar in assault, battery, and *maihem*, for the same battery, though a greater mischief afterwards appears; for that is only an aggravation of the same battery. *R. 1 Sal. 11. Vide supra.*

(K. 4.) Recovery against one.

So, in actions, in which the damages are uncertain, a recovery and execution against another for the same cause, is a bar to another action for the same cause; as, in trespass done by several, a recovery and execution against one, is a bar in an action against the others for the same trespass. *R. Tel. 68. R. 1 Leo. 19. 3 Leo. 122.*

So, in a battery by several, a recovery against one, is a bar in an action against the others for the same battery. *R. Tel. 68.*

So, in *trover* for goods. *R. Mo. 1762. R. Tel. 67. 2 Cro. 73.*

So, in assault and imprisonment. *Lut. 945.*

So, in an action upon the case by one obligee for cancelling a bond made to him and others. *Per two J. Lat. 124.*

So, upon a bill of exchange, if the owner recover against the drawer, it will be a bar in an action upon the same bill against the indorser. *R. per three J. 3 Mod. 86.* But the judgment was afterwards reversed. *Lut. 882. Vide post. (L. 4.)*

A recovery against one obligor, and execution, will be a bar in debt against the other. *R. Mo. 29. Vide post. (L. 4.) *Qu.* of this unless the money be paid, for the obligee has an action against every one of the obligors till his debt be satisfied.*

(*a*) A bar in trespass, unless where the property has been determined, does not seem to be a bar in *trover* for the same cause, for trespass will lie where *trover* will not. *Vide 2 Mod. 319, 320.*

And,

And, it is not necessary to say, *where* the recovery was; for it shall be tried by the record. *R. Mo. 29.*

[If a servant bound in a penalty not to leave his master's service is enticed away by another, and the master recovers the penalty against the servant, he cannot recover damages against the enticer. *Bird v. Randall, M. 3 G. 3. 3 B. M. 1345.*]

So, a recovery in an action upon the case by several, will be a bar in an action by one of them for the same matter, though it varies in some particulars. *R. per three J. Jones, C. J. cont. 3 Lev. 180.*

So, a recovery is sufficient without execution; for by the judgment a matter before uncertain is reduced to a certainty. *R. Tel. 67, 8. 2 Cro. 73. R. 6 Co. 45.*

(L) When not.

(L. 1.) But a Bar in one Action, is no Bar to another Action of a higher Nature.

BUT in real actions, if the demandant be barred by judgment upon a verdict, demurrer, confession, &c. he may have another action of a higher nature. *6 Co. 7. b.*

As, if he be barred in an action of his own possession, as an assise of *novel disseisin*, upon shewing a descent or other special matter, he may have an assise of *mort d'ancestor*, *aiel*, *besaiel*, entry *sur disseisin*, to his ancestor. *6 Co. 7. b.*

So, if he be barred in a *formedon in descender*, he may have a *formedon in reverter*, or *remainder*. *6 Co. 7. b.*

So if he be barred in a *dum fuit infra etatem*, he may have a writ of entry *sur disseisin*. *Tb. D. l. 11. c. 38. f. 6.*

So, if he be barred in any action upon the seisin of his ancestor, or his own possession, he may have a writ of right. *R. 6 Co. 7. b.*

(L. 2.) So a Bar to one who has only a particular Right is no Bar to an Action of the same Nature by another.

So, if a demandant, barred in a real action, had only a qualified right, that is no bar to another action of the same nature by his issue or successor; as if tenant in tail be barred in a *formedon* by verdict or demurrer, the issue shall have a new *formedon*; for he claims not only as heir, but also *per formam doni*. *6 Co. 7. b.*

So, if he be barred in a writ of error by his own release, the issue shall have a new writ of error. *6 Co. 7. b.*

So, if a parson, prebendary, &c. be barred in a real action without praying in aid of the patron and ordinary, that is no bar to his successor. *6 Co. 8. a.*

(L. 3.)

(L. 3.) Nor to an Action by the same Person upon another Right.

So, if a demandant be barred in a real action, he may have another action for a collateral right; as, a wife, barred in an assise, may have a writ of dower. *Th. D. l. 11. c. 38. f. 9, 10.*

But, if an obligation be upon condition to do two things upon request, and the defendant pleads, no request to do one of them, and there is a verdict against the plaintiff, he shall not have another action upon the same obligation for not doing the other thing. *R. Dy. 371. b.*

(L. 4.) Nor, if the Bar in the former Action was upon Plea to the Writ.—And other Instances.

So, in actions, real or personal, if the demandant or plaintiff be barred by judgment upon verdict or demurrer, when the tenant or defendant pleaded only to the writ, and not to the action of the writ, the demandant or plaintiff may have the same action again. *6 Co. 8. a.*

As, if an executor sue as administrator, and is barred, he may have an action afterwards upon the same obligation as executor. *R. 5 Co. 33. a. Th. D. l. 11. c. 38. f. 13. R. 2 Cro. 15.*

If a *replevin* abates, the plaintiff may have another *replevin*. *Th. D. l. 11. c. 38. f. 43.*

In account, it is no bar, that the plaintiff was barred in an *infinul computasset* for the same goods, where the former action was brought before the account stated. *R. 2 Mod. 294.*

So, a recovery in an assise for lands in *Lee juxta Tunbridge*, is no bar in trespass in his land in *Tunbridge*, though averred, that the same land was put in view, if the plea was not to the land put in view, but generally, *nul tort, &c.* *R. 1 Leo. 24.*

So, a bar in action by one as servant, is no bar in an action by the master for the same thing, if the former action was not with his privity: as, in *replevin*, if the defendant make consuance for rent as bailiff to *A.* it is no bar to a consuance afterwards for the same rent, unless it appears that it was with the assent of *A.* *Semb. 2 Lev. 210.*

In an action upon the case, if the plaintiff was barred upon a default of the *venue*, or other defect in the declaration, that will be no bar in another action for the same cause. *Semb. 2 Mod. 42.*

So, a nonsuit in an appeal of *mayhem*, though peremptory in that action, is no bar in trespass for the same battery. *2 Rol. 570. l. 6.*

So, if the tenant or defendant plead to the action of the writ, and the demandant or plaintiff, who has mistaken his action, be nonsuit, or discontinue, he may afterwards have his rightful action; as, if a man bring a *formedon in remainder*, where it ought to be a *formedon in reverter*. *6 Co. 7. b.*

If he barred in *replevin*, for want of an averment, or other mistake in the manner of the plea. 2 *Lev.* 210.

So, if the same evidence does not maintain both actions, a bar in one is no plea to the other; as a bar in trespass is no plea to *trover* for the same goods; for *trover* lies upon a bailment, but trespass lies only upon a tortious taking. *R. Ray.* 472. 3 *Mod.* 1. *Pol.* 634. *Dub.* 2 *Vent.* 169. And *Pol.* 644. says, that error was intended. *R. cont. Sho.* 146. *Vide ante*, (K. 3.)

So, a bar, or recovery in an *assumpsit*, is no bar in debt upon a judgment, or specialty. *Cro. Car.* 6.

So, a judgment, or bar in ejectment, is no bar in another ejectment upon a new demise. *Mar. pl.* 92.

So, a recovery in debt for rent due at *Mich.* is no bar in debt for rent due at a former day. 1 *Lev.* 44.

Nor is a consuance, or avowry for rent, due at *Mich.* a bar to an avowry for rent due from the same tenant at a former day. *R.* 1 *Lev.* 43.

So, in an action in an inferior court not of record, a recovery is no bar to another action for the same cause in a court of *Westminster*; as, a judgment upon a bond in the county court is no bar to an action upon the same bond in *C. B.* *Adm.* 6 *Co.* 45. a. *R. cont.* 2 *Lev.* 93. *Semb. acc.* if the inferior court had no jurisdiction. 3 *Lev.* 234.

So, judgment in a court baron in trespass is no bar to an action for the same trespass in the county palatine court: for the action in the court baron was not *vi et armis*, and so is not the same trespass; or it was *vi et armis*, and then the court baron had no jurisdiction. *R.* 2 *Lev.* 93.

So an action, and recovery of damages in one respect, is no bar to another action for the same goods in another respect; as, a recovery in trespass *quare cepit et abduxit oves*, and 2d. damages, is no bar in *trover* for the same sheep; if the plaintiff replies, that the recovery in trespass was only for the taking away, and not for the value of the sheep. *R. Cro. Car.* 36.

Nor in *replevin* for the same beasts; if it be so replied. *Semb.* 3 *Lev.* 125.

So, a recovery and execution against one, where the thing demanded is certain, is no bar in another action against another upon the same foundation; as, if two be bound by a bond, a recovery and execution against one, is no bar in an action upon the same bond against the other obligor. *D. Tel.* 67. 6 *Co.* 45. a. 2 *Cro.* 74. *Vid.* (K. 4.)

So, judgment and execution against one, who was permitted to escape by the sheriff, is no bar to an action upon the same obligation against the other obligor; for an escape by the sheriff is no satisfaction to the plaintiff. *R. Cro. Car.* 75.

So, judgment against the drawer upon a bill of exchange is no bar against the indorser of the same bill. *R. Lut.* 882. *Vide ante*, (K. 4.)

So, a *retraxit* entered in debt against one obligor is no bar in debt against the other obligor. *Dub. Jon.* 451. *Cro. Car.* 551.

So,

So, another action and judgment upon it, is no bar, if the plaintiff was not barred by the judgment; as in debt upon an obligation, another action upon the same obligation, and upon *non est factum* a verdict for the defendant, and judgment *quod eat inde sine die*, is no bar; for the judgment is not *quod querens nihil capiat per breve*. R. 2 Cro. 284.

[A promissory note is not merged by an interlocutory judgment; so if there is judgment by default on a note against a debtor of the king's debtor before the extent and inquisition, and the writ of enquiry is executed after the inquisition, the crown may have *scire facias* on the note. *Attorney-General v. Elwell*, T. 1725. *Bunb.* 199.]

[Recovery of damages, *sur prohibition*, is not a bar to an action on *stat. 2 H. 4. c. 11.* for double damages and 10*l.* penalty, for suing in the admiralty where it has not jurisdiction; the first is for going on *after prohibition*, the other for damages incurred *before prohibition* granted. *Smith v. Gibson*, M. 10 G. 2. B. R. H. 317.]

(M) Election to have one Action or another.

(M. 1.) Assise, or Action upon the Case.

IN many cases the demandant or plaintiff may elect either to have one action, or another: for in all cases, where the Register has two writs for the same case, the plaintiff may have the one, or the other. R. 4 Co. 95. a. *Slade*.

So, if a man intirely stops the way, watercourse, &c. of another seised in fee, &c. he may have an assise, or an action upon the case. 1 *Rol.* 104. l. 30. *ad. 50.*

So, if one ploughs his common, whereby it is entirely lost. 1 *Rol.* 104. l. 41.

So, an assise of nuisance, or an action upon the case. 2 *Rol.* 49. *Vide Action upon the Case for a Nuisance*, (D. 1.)

(M. 2.) Action upon the Case, or Trespafs.

So, a man may sometimes have an action upon the case, or trespafs, at his election; as, if any one takes out of his possession wood cut down by him. R. 1 *Rol.* 105. l. 21.

Or, distrains the tenants of the lord *paravail* to come to the leet of the lord *paramount*. 4 Co. 94. b.

Or, distrains for toll when it is not due, or goods not distrainable. 4 Co. 94. b.

Or, rescues a defendant taken upon a *capias* at my suit. R. 2 *Rol.* 556. l. 25. 35.

So, if he seises for a heriot, &c. not due. R. 2 Cro. 50.

So, if he detains a ship taken for a voyage, the master of the ship, who had the possession, shall have an action upon the case, or trespafs. R. 1 *Sal.* 11.

(M. 3.) Action upon the Case, or Debt.

So, upon every contract executory, a man may have an action upon the case, or debt. 4 Co. 95. 1 Rol. 593. l. 10. *But case is most eligible, because in it there is no law-wager.*

(M. 4.) Debt, or Covenant.

So, where a man covenants to do a thing under a penalty, the other may have debt, or covenant. 1 Rol. 592. l. 40.

If a covenant be to pay rent, or other sum at such a day, he may have debt, or covenant. 1 Rol. 518. l. 1. R. Cro. El. 797. *Vid. 1 Morgan's Vad. Mec. 39.*

So, if he say by his deed, *I am content to pay.* 3 Leo. 119.

(M. 5.) Action upon the Case, or Account.

So, where a man is accountable, for money, or goods, an action upon the case lies against him, or account at election. 1 Sal. 9. *Vide Action upon the Case upon Assumpsit, (A. 1.)*

As, if A. be twice paid for the same goods. R. Jon. 196, 7.

(M. 6.) Detinue, Replevin, or Trespass.

So, a man may have *detinue*, or *replevin*, or trespass for goods taken from him by wrong. Cro. El. 824. 2 Cro. 50. *But *replevin* is now seldom or ever used but upon distress for rent, &c. And where goods are taken by way of levy, as for a penalty, on conviction, under a statute, it is generally in the nature of an execution, and unless a *replevin* be granted by the statute, *replevin* will not lie. 1 Morgan's Vade Mec. 39.*

(M. 7.) Trover, or Trespass.

So, he may have *trover*, or trespass, at election, for goods taken by wrong. R. Cro. El. 824. 2 Cro. 50. *Vid. 1 Morg. Vad. Mec. 40.*

(M. 8.) Action upon a Statute, or by Common Law.

So, he may have an action upon a statute, or by common law, *Vide Action upon Statute, (C.)*

(M. 9.) Suit in the Temporal or Spiritual Court.

So, sometimes a man has election to sue in the temporal court, or in the spiritual court; as for a pension by prescription. F. N. B. 51. B. 1 Sid. 146. *but this is where a parson or vicar claims a pension out of another church. F. N. B. loc. cit.*

(N) In

(N) In what County an Action shall be sued.

(N. 1.) When in the proper County.

(N. 1.) **E**VERY action for recovery of the seisin, or possession of land, shall be brought in the county where the land lies. *Brass. 189, 414.*

So, *curia claudenda* shall be brought in the county, where the land lies, to which the inclosure ought to be made. *Dy. 38.*

(N. 2.) But before the *stat. 27 H. 6. 26.* which divided *Wales* into counties, an action for a feignory or barony in *Wales*, being out of any county, was to be brought in some county in *England*, nearest to the said feignory or barony. *Th. D. l. 7. c. 2. f. 2.*
(D.) But this seems to have been founded upon an ancient statute now lost. *Vau. 404, &c.*

And this extended only to lordships marchers, and not to any other land in *Wales*. *Vau. 412, &c. (a)*

And, there was no need, that the writ should say, that the county was adjoining; for that shall be intended *prima facie*. *R. 35 H. 6. 30. a. Vide Vau. 409.*

But an ejectment, &c. for lands in *Brecknock*, or other county in *Wales*, shall not be tried in *Monmouthshire*, which is made an *English* county by the *stat. 27 H. 8.* but in the county of *Hertford*, which is the next county. *R. Hard. 66.*

So, if issue be joined upon land in *Berwick*, which is part of *Scotland*, it shall be tried in the county next to *Berwick*. *1 Mod. 37. 1 Vent. 58, 90. 1 Sid. 382.*

So in personal actions, if the issue arises in *Berwick*, the *venire* shall be directed to the next county. *1 Sid. 382.*

* Land held of the counties palatine of *Chester* or *Durham*, is pleadable in the counties palatine, notwithstanding the land lie in another county, and not in the county where it lies. And in a writ of right patent, it is said, directed to the lord of a manor of land lying in another county and held of the same manor, the officer of the court may execute the precept, in the other county. *Th. D. l. 7. c. 2. f. 4.**

* But if the writ be brought by the bishop of *Durham* himself, of land in *Northumberland*, held of the county palatine of *Durham*, the writ must be directed to the sheriff of *Northumberland*. *Ibid.*

* But what is said in the preceding paragraph is to be understood of the case where the land is sued for in the courts of the county palatine; for if the suit be in any of the courts of *Westminster-hall*, then*

Though the land lies in a county palatine, it shall be tried in the next county; as, in ejectment for land in *Ely*, upon a suggestion, *quod nullus ingredi potest ad jurat*, &c. the *venire facias* shall be *de vicineto* from the next vill in the county of *Cambridge*. *1 Sal. 183.*

(a) The examples cited in *Th. D. l. 7. c. 2.* shew that this was not confined to the case of Lords Marchers.

So,

So, if the land lies in *Ireland*, or the plantations. *R. Mod. Ca. 194.*

And a suggestion is sufficient, without a confession, or *nient dedire* of the defendant. *R. 1 Sal. 183.*

But an indictment, or appeal of felony in *Wales* shall be brought and tried there, and not in the next county. *R. Jon. 255.*

Or, the felon may be removed by *habeas corpus*, and indicted in an *English* county. *R. 2 Mod. Ca. 145. Vide Wales (D.)*

[If a matter cannot be tried, or not fairly in the proper county, it shall be tried in the adjoining ; and it shall be done by a suggestion on the roll with a *nient dedire*, by rule of the court ; but as this suggestion cannot be traversed, the court will not grant rule without a clear foundation. Thus on information against aldermen for refusing to admit persons to their freedom for some time, till the election was over, whereby they lost their votes, it is not sufficient to swear that one believes there cannot be a fair trial. *Rex v. Harris, T. 2 G. 3. 3. B. M. 1330.*

An assise lies by the common law in *confinio comitatús* for common of pasture, turbary, or pischary, in one county, appendant or appurtenant to land in another county. *Co. Lit. 154. a. F. N. B. 180. A.* (N. 3.) For land in two counties when it lies in *confinio comitatús*.

So, for a nuisance in one county to land in another. *Co. Lit. 154. a.*

So now by the *stat. 7 R. 2. 10.* an assise lies in *confinio comitatús*, for rent issuing out of land in two counties. *Co. Lit. 154. a. F. N. B. 180. A.*

And, that if there are twenty counties intervening. *Co. Lit. 154. a.*

Or, the land lies in twenty counties. *Co. Lit. 154. a.*

The writ in *confinio comitatús* must mention that the land, &c. lies in both the counties. *35 H. 6. 30. a.*

So every action, in which the issue may arise upon the land, must be brought, where the land lies ; as, a right of ward of land. *7 Co. 2. b.* (N. 4.) Action in which the issue may arise upon the land.

Intrusion of ward ; though the refusal, or the seigniorship be in another county. *7 Co. 2. b.*

Right of ward of the body ; for that favours of the land. *7 Co. 2. b.*

Writ of forfeiture of marriage ; for that supposes an intrusion upon the land. *7 Co. 3. a.*

Writ *de valore maritagii*. *7 Co. 3. a.* Unless there was a tender and refusal of marriage ; for then it shall be brought where the refusal was. *7 Co. 3. a.*

So, a *quare impedit* shall be always brought, where the church is. *7 Co. 3. a.*

Except in the case of the king. *7 Co. 3. a.*

And a *quare incumbavit*. *7 Co. 3. a.*

So, a *quare impedit* of a prebend shall be brought in the county, where the cathedral is, and not, where the body of the prebend

is; for he shall be installed in the cathedral. 7 Co. 3. a. R. Dy. 194. b. *Tb. D. l. 7. c. 2. f. 8.*

So, a *warrantia chartæ* upon a fine, or feoffment with a warranty shall be brought, where the land lies. Semb. 7 Co. 3. b.

So, waste shall be brought where the land lies. 7 Co. 2. b. Dy. 40. b.

Tho' it be in the *tenuit*, in which damages only are recovered. 7 Co. 2. b.

And tho' the lease be made in another county. 7 Co. 2. b.

So, debt for a fine upon a copyhold must be brought where the land lies. Semb. Vide Ent. 177.

So, debt for rent, when it is not founded upon the contract, shall be brought, where the land lies; as, debt by the assignee of a reversion for rent payable, and upon a lease made, in another county. R. Cro. Car. 184. Semb. Cro. Car. 143. 1 Sand. 238. 1 Lev. 259. R. Jon. 43. *3 Mod. 337.*

So, debt by the lessor against the executor of tenant for life, for rent behind in the life-time of the testator. Semb. 7 Co. 3. a.

So, debt by an executor by the *stat.* 32 H. 8. 37. for the arrears of a rent in the life-time of his testator. Semb. 7 Co. 3. a. R. Lat. 197.

So, debt by an executor for the arrears of a rent-charge granted to the testator for his life. R. Hob. 37.

So, debt in the *debet et detinet*, against the executor, or administrator, of the lessee. R. 1 Sid. 266. 2 Lev. 80.

So, debt for rent against the assignee of the term, by the assignee of the reversion. R. cont. Cro. El. 636.

But if the land lies in two counties, the action may be in the one, or the other. 7 Co. 3. a.

And, if debt is founded upon the contract, it shall be, where the lease was made. 7 Co. 2. a. Vide post. (N. 6.)

As, if the executor or administrator of a lessee assign, debt against him in the *detinet*, for rent due after the assignment, shall be where the lease was made. R. 1 Sid. 266.

If the lessee himself be sued for rent by the lessor, it may be in the county where the lease was made. 7 Co. 2. a.

So, covenant against the lessee shall be in the county, where the lease is alledged. Vide 1 Lev. 259.

Tho' the breach be for not repairing. R. 2 Cro. 142. Noy 142.

So, debt for rent upon a demise of land in *Ireland*, or the plantations. R. Mod. Ca. 194.

So, if covenant be by the assignee of a reversion against the lessee for non-payment of rent, it shall be brought where the lease and assignment were made, for it is founded upon the contract. R. 1 Sand. 240. 1 Lev. 259. *Qu. For it is not founded on the contract but on the privity of estate. Vide 3 Mod. 338.*

Yet, covenant by the assignee of a reversion against the assignee of a lessee of land in *Ireland*, upon an express covenant by the lessee and his assigns to pay the rent in *London* cannot be sued in *London*,

London, where the lease was made, and the payment ought to be.
Vide Sbo. 192. R. 1 Sal. 80. 3 Mod. 337. Carth. 182.

So every action founded upon a local thing, shall be brought in the county, where the cause of action arises; for there it can be best tried. (N. 5.)
 Action founded upon any thing local.

As, an appeal of death must be in the county, where the murder was committed. *Cro. Cur. 247. St. P. C. 63. a. Vide Appeal (E.)*

And, an appeal of robbery, in the county, where the robbery was committed. *7 Co. 2. a.*

An appeal of rape in the county, where the woman was ravished.

So, if a robbery, murder, &c. be committed in one county, and a man be accessary by procurement in another, an appeal against him as accessary shall be, where the procurement was, and not, where the robbery, &c. *R. Dy. 39. Vide 7 Co. 2. b.*

So, deceit shall be brought in the county where it was done. *F. N. B. 98. L.*

So, account against a bailiff of a manor, or land, must be in the county where the manor or land lies. *2 Inst. 231.*

Tho' the action be founded upon a thing mixed with mere matter of record in another county: as an action upon the case, for procuring him to be outlawed at *Westminster*, whereupon he was imprisoned upon a *capias utlagatum* in *Norfolk*, shall be brought in *Norfolk*; for there was the visible wrong, and the process of outlawry at *Westminster* is only matter of record, which is not triable by the country. *R. 7 Co. 1. Bulwer.*

So, if a transitory action be confined by the issue to a local thing, it must be brought, and tried in the county, where such thing happened. *Vide post. (N. 12.)*

So, if the issue be not local, but arises upon matter, which was local; as, in a real action, if there be judgment against the defendant by default, who assigns non-age for error, it shall be tried where the land lies. *R. Cro. El. 818.*

By the common law, account, covenant, debt, *detinue*, &c. might have been brought in any county, and the plaintiff might have declared on a contract in any other county; for *debitum et contractus sunt nullius loci. 7 Co. 3. a. Th. D. l. 7. c. 5. 2 Inst. 231.* (N. 6.)
 Action founded upon contract.

But by the *stat. 6 R. 2. 2.* that debt, account, and such like actions may be brought in the same county, where the contract was made, it is enacted, that if by the declaration it appears, that the contract was in another county than where the writ is brought, the writ shall bate. *2 Inst. 231. Vide Abatement, (H. 17.)*

And therefore, if debt be brought in *London* upon a recognizance made at *Westminster*, it abates. *Th. D. l. 7. c. 5. f. 7.*

Or, upon an obligation, or other specialty which is dated in another county. *Th. D. l. 7. c. 5. f. 10. Semb. Ray. 430.*

So, debt upon a judgment at *Westminster*, upon a contract made at *York*, must be in *Middlesex*. *R.* that it may. *Mo.* 884.

[If a bond is made in *Surry*, and an assignment of it in *London*, action on the assignment may be brought in *London*. *Gregson v. Heather*, *H.* 13 *G. Fort.* 366. *Str.* 727. *Norcroft v. Mathews*, *T.* 13 *G. Ld. Raym.* 1455.]

So, if it appears upon the record, that the contract was in another county, it is error.

Tho' it be tried in another county by the consent of the parties, if such consent does not appear upon the record. *R.* 1 *Roll.* 28.

And, if an obligation, &c. was alledged in the county, where the action was brought, anciently the defendant might have pleaded in abatement, that, it was made in another county. 3 *H.* 6. 35.

Or, upon the defendant's prayer, the court might have examined, whether it was made in the same county. 3 *H.* 6. 30. *b.* [29.] 9 *Ed.* 4. 48. [45] *Th. D. l.* 7. *c.* 5. *f.* 13.

But, now this is not used; and if an obligation, or other specialty be dated at large, debt upon it may be brought in any county. *Th. D. l.* 7. *c.* 5. *f.* 15, 16. *Vide post.* (N. 12.)

And, a plea, that the obligation was made in another county, is bad. *R.* *Al.* 17. *F. N. B.* 146. *E.*

So, if by the declaration the obligation be alledged in a *county palatine*, yet after the general issue, or a plea in bar, the defendant shall not have advantage of it. *R.* *Carth.* 11. *Vide Franchises*, (D. 9.)

Tho' action of *debt* for rent is local, yet *covenant* is transitory. *Thrale v. Cornwall*, *T.* 21 *G.* 2. 1 *Wils.* 165.

* Every transitory action may be laid in any county in *England*, tho' the matter arise beyond the seas. *Cowp.* 181.*

(N. 7.)
Action
founded
upon con-
tract out of
the realm.

As, if a personal action be upon a contract, &c. out of the realm, it may be brought in any county, and alledged to be made at *Fort St. George*, &c. viz. *apud M. in such a county*. *Vide Sal.* 660. **Cowp.* 178.*

But if it be alledged, at *Fort St. George apud Ind. Orient.* in *London*, it will be bad. *R.* *Mod. Ca.* 228:

[Action may be brought in *London* for money borrowed at *Amsterdam*, and by articles covenanted to be paid in bank there. *Dutch West-India Company v. Henriques*, *M.* 11 *G. Str.* 612.

(N. 8.)
Action
against jus-
tices, of
peace &c.

So, by the *stat.* 21 *Jac.* 12. it is enacted, that actions on the case, trespass, battery, or false imprisonment against any justice of peace, mayor or bailiff of city or town corporate, port-reeve, constable, tithing-man, collector of subsidy, churchwardens, and persons called sworn-men executing the office of churchwarden, or overseer, or their deputies, or any who in their aid, or by their command do any thing touching his or their office, for any matter done by virtue or reason of any of their offices, shall be laid in the county, where the fact was done, and not elsewhere; and if at the trial, the plaintiff shall not prove the cause of

of action to have been in the same county, the jury shall find for the defendant, without regard to any other evidence.

4 *Inst.* 175.

And, if an action be against a justice of peace, &c. for a matter or thing done by colour or under pretence of his office, tho' it be not strictly within the duty of his office, the jury shall find for the defendant if the cause of action does not arise in the same county. *R. Vau.* 114, &c.

If an action be against a justice of peace, or other officer within the *stat.* 21 *Jac.* out of the proper county, and this appears upon the evidence at the trial without being pleaded, the verdict shall be for the defendant. *Vide Vau.* 111.

Or, the defendant may plead the statute to an action out of the proper county, in a court of *Wales*, &c. *Jon.* 248.

And, if the plea be not allowed, a prohibition shall go. *R. Jon.* 248.

[But if a constable under a warrant take a man and carry him before a magistrate, who discharges him, and soon after, on a dispute happening, the constable beats him; this is not within the statute, and the constable need not be sued in the county, *Anon. T. 7 G. Str.* 446.]

So, an indictment must be in the county, where the offence was committed: and therefore, if an indictment for a forcible entry into land in *Middlesex* be found in *Gloucester*, it will be void. *Cro. El.* 184. (N. 9.)
Indictment, and
appeal.

So, if an indictment for words, or other transitory thing be in a county, where the words were not spoken, or the thing not done, upon not guilty, the defendant ought to be acquitted. *H. P. C.* 203.

If an indictment be in *Middlesex* for levying war, war levied in the county of *Surry* cannot be given in evidence. *R. Kelg.* 15.

But, if the indictment be for compassing the death of the king, and the levying war be alledged as an *overt-act* of such treason, war levied in another county may be given in evidence; for there it is not local. *R. 14 Car. 2. Kelg.* 15.

If an indictment be for coinage in com. *Middlesex*, if that be proved, other acts in the counties of *Effex*, and *Suffex*, may be proved in confirmation. *R. Kelg.* 33.

So, tho' by the *stat.* 33 *H. 8.* 23. the king's commission shall be made by the chancellor into such shires and places, as shall be named by the king for trial of persons who on examination of the king's counsel shall confess, or be suspect of treason, misprision, or murder, yet the *stat.* 1 & 2 *Ph. & M.* 10. which says, that all trials hereafter for treasons shall be according to the due order and course of the common law, and not otherwise, was a repeal of the former act. *Dy.* 132. a. *R. Per Just.* of both benches, *Dy.* 286. b.

But by the *stat.* 26 *H. 8.* 13. and 35 *H. 8.* 2. Treason, or misprision done out of the realm shall be enquired, &c. in *B. R.* or before commissioners in such shires as shall be assigned by the king's

king's commission. And these statutes are not repealed by the *stat. 1 & 2 Ph. & M. 10. Dy. 132. a. 298. b. 3 Inst. 11.*

So, an appeal must be in the county, where the offence was committed. *R. Cro. Car. 247. St. P. C. 63. a. Vide Appeal (E.) Vide ante (N. 5.)*

And if *A.* commits a robbery *in com. Wilts.*, and *B.* is accessory in another county, altho' the appeal must be against the principal and accessory together, and must be against *A. in com. Wilts.*, yet it shall abate, if it be against *B.* there; for in case of life, every fact shall be tried, where in truth it was done. *7 Co. 2. b. Dy. 38.*

(N. 10.)
Action popular, and information.

By the *stat. 31 El. 5.* A declaration or information on a penal statute shall be alledged in the county, where the offence was done; or the county may be traversed.

And so, by the *stat. 21 Jac. 4.* it is enacted, that all offences against the penal statute, for which a common informer may ground any popular action or information before justices of assize, *nisi prius*, gaol delivery, *oyer and terminer*, or justices of peace, shall be persecuted and tried, &c. before them, &c. and not elsewhere, save only in the said counties. *1 Sal. 373. Vide Action upon Statute, (D.)*

And in all informations, complaints, declarations to be commenced on behalf of the king, or any other for any offence against any penal statute, the offence shall be alledged in the same county, where it was committed, and not elsewhere, and if at the trial the plaintiff or informer prove not the offence done in that county, the defendant shall be found not guilty.

The *stat. 31 El.* does not extend to informations by the attorney general, but by a common informer only; but the *stat. 21 Jac. 4.* extends to both. *4 Inst. 172. in marg. D. 1 Vent. 8. 3 Inst. 193. Adm. Cro. Car. 112. Per two J. Cro. El. 737. Per Holt, 1 Sal. 373.*

And debt upon a penal statute, as well as an information, must be in the county where the offence is committed. *R. cont. 1 Vent. 8. 1 Lew. 249. 1 Sid. 400. R. acc. per Holt, and all the judges, 10 W. 3. 5 Mod. 425. 1 Sal. 372. 373. Cont. 4 Mod. 159. Dub. 2 Lew. 204.*

So, an information must be in the proper county, tho' the justices of the peace, or assize, have not a jurisdiction to determine it. *Vide Hard. 105. R. cont. Hutt. 98. Semb. cont. Sti. 40.*

And therefore, if an information be out of the proper county, the defendant may demur. *R. 4 Mod. 158.*

But by the proviso's in the *stat. 31 Eliz. 5.* and *stat. 21 Jac. 4.* an action or information for maintenance, champerty, or buying of titles may be brought in any county.

So, an action or information for defrauding of customs, tonnage, or poundage, subsidy, impost, or prisage.

[So an information for not making a true report on importation, contrary to statute, may be brought in any county, but the importation

portation must be alledged according to the fact. *Attorney General v. Moyer, H. 1728. Bunb. 261.*]

And, by the proviso in the *stat. 21 Jac. 4.* nothing in that act shall extend to an action or information on any statute against Popish recusants, or concerning recusancy, or not coming to church, &c. or for transporting of gold, silver, ordnance, powder, shot, munition, wool, woollfells, or leather.

So, the *stat. 21 Jac. 4.* does not extend to offences against any penal statute made since *21 Jac. R. 5 Mod. 425. 1 Sal. 372.*

[Therefore an affidavit that the cause of action arose in the county where the action is laid, is not necessary in an action on *12 Ann. c. 16. (of usury.) French v. Cockran, M. 11 G. 2. Andr. 25.*]

So, an information for not repairing a bridge in the county of *Nottingham*, because the whole county is chargeable, shall be tried by a jury of another county. *R. 2 Lev. 112.*

(N. 11.) When an Action shall be brought in the one County, or the other.

But, when an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county, or the other: as, if a servant be retained in one county, and depart into another, an action lies in the one, or the other. *7 Co. 2. a. Dy. 38. b. 40. a.*

[If a lease is made in *London* of lands in *Surry*, action for the rent may be brought in either against the lessee, but not against an assignee, who is chargeable only by the privity of estate. *Patterson v. Scot. T. 13 G. Str. 776.*]

So, if an arrest be in one county, and an escape in another. *7 Co. 2. a. 1 Lev. 114.*

So, if an annuity be due by prescription from a corporation or house of religion, which is in one county, and the feisin alledged in another. *7 Co. 2. a. Vide Dy. 38. b.*

If a man be cited in one county, before the admiralty in another county, for a thing out of the jurisdiction of the admiralty, an action lies in the one county, or the other. *7 Co. 2. a.*

So, if he be cited in one county, before a court christian in another, for a thing out of their jurisdiction. *7 Co. 2. a.*

If the defendant cast a protection in one county, and remain in another. *7 Co. 2. a.*

So, if a man be stricken in one county, and die in another, an appeal of murder lies in the one county, or the other. *7 Co. 2. a. Dy. 40. b.*

So, an appeal of felony, where a robbery was in one county, and the goods carried into another. *7 Co. 2. a.*

If a man hires a horse in one county to ride to another, an action for the immoderate working of him, lies in the one county, or the other. *R. 1 Lev. 286. Semb. Cro. Car. 20.*

So, covenant lies in the one county, or the other, upon an indenture of demise in one, of a house in another. *1 Lev. 114.*
Or,

Or, upon an indenture of covenant made in one county, to make assurance, which was tendered in another. *Dy. 338. a.*

So, in an action upon the case, for not returning a summons in a writ of entry for land in another county. *R. 1. Leo. 146.*

So, in an action upon the case, for not repairing a wall *ratione tenuræ* of land, whereby the plaintiff's land was drowned, if the wall be in one county, and the plaintiff's land in another. *R. 3 Leo. 141. Vide 7 Co. 2. b.*

So, in an action for a false return of *non est inventus*, where the sheriff was in the company of the party. *R. 2 Mod. 23.*

In an action upon the case, for a debt against the sheriff of *Hertford*, for an escape in his county, of one taken upon a *testatum capias ad satisfaciendum* upon a judgment at *Westminster*. *R. in C. B. Hil. 3 Geo.*

For administering unwholesome medicines in one county, where the promise of cure was in another. *Dy. 38. b. Vide 7 Co. 2. b.*

So, if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county, or the other. *7 Co. 1. b.*

As, if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county, or the other. *7 Co. 1. b. Vide Action upon the Case for Conspiracy, (C. 2.)*

*So where *A.* by deed executed in *London* for securing the re-payment of money lent to *B.* is appointed receiver of *B.*'s rents in *Middlesex* with a pretended salary, which enables him to retain usurious interest, he accordingly receives the rents in *Middlesex*, but settles the account in *London*, and there pays the balance, on which the usurious interest is allowed; the offence is complete in *London*, and the venue in a *qui tam* action for the penalty is properly laid there, or it might be in *Middlesex*. *Scott qui tam v. Bret. 2 Term Rep. 238.**

So if an action upon the case be against the sheriff of *Denbighshire*, for not arresting a man upon *capias utlagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it may be in *Denbighshire*, or in *Middlesex*, where the return was made. *R. Hob. 209.*

So, for maliciously suing execution in *Middlesex*, whereby he was arrested in *Dorsetshire*. *Per three J. Cro. El. 574.*

So, if in error upon a judgment in dower for land *in com. Brecon* it be alledged, that the tenant appeared by attorney being within age, viz. *apud A. in com. M.* it will be well; for this matter *dehors* may be in another county, as well as where the land lies. *R. 2 Jon. 171. Vide Ray. 458.*

So, upon request of the parties, and the consent of them and the court, entred upon the record, a trial may be in another county than where the land lies, or the action is brought. *R. Ray. 372. Cont. Hob. 5.* but there the consent was by rule, and not entred upon the record. *Ray. 372. Vide 1 Rol. 28.*

As, in trespass, if the defendant justify by the custom of foreign buying and selling, within the city of *Tork*, and issue be upon the custom, upon a suggestion that the sheriff and coroners

coroners of *York* are citizens, and that there are no freeholders within the county of the city, except citizens to try the issue; if that be admitted, or not denied, a *venire facias* shall be awarded to the next county. *R. Dy. 279. b. Bend. 23.*

But a suggestion, that a matter in which the citizens are concerned may come in contest, is not sufficient, if that does not appear by the issue. *R. Hard. 312.*

[As, if the corporation of a city, a county in itself, is lessor of the plaintiff. *Mayor of Bristol v. —. T. 17 G. 2. Wilf. 77.*]

(N. 12.) When an Action shall be in any County.

When an action is for a transitory thing, it may be brought in any county; as, if it be upon a covenant, or contract, or debt at large, it may be brought in any county; for *debitum et contractus sunt nullius loci.* 7 Co. 3. a. 2 Inst. 229, 231. *Vide ante* (N. 6.)

[So, action against a sheriff for a false return, for he may make return any where. *R. on Demurrer. Griffith v. Walker, M. 26 G. 2. 1 Wilf. 336.*

So, trespass for an assault and battery may be in any county. *Cro. Car. 444.*

So, *trover*, and other actions upon the case.

So, if a personal action be founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged *at such a place in such a county*: as, if debt be upon a bond or bill, &c. made at *Hamburg*, it may be alledged at *H. viz. apud Iffington in com. Middlesex.* *R. Lat. 4. Sal. 660.*

Tho' the bond upon oyer appears to be dated in *Hamburg.* *R. Sal. 659, 660. Cont. per Holt and Powel, Lut. 950.*

So, it may be alledged at *H. in com. Middlesex.* 2 Cro. 76.

And, if the defendant plead, that *H.* named in the bond is beyond the seas, and no such vill in *England*, it will be a bad plea. *R. upon Demurrer, 2 Cro. 76.*

So, in a personal action alledged at any place within the realm, if the proof be for a right of the plaintiff at any place out of the realm, the plaintiff shall have a verdict. *Per Holt, 1 Sal. 290.*

But if a bond be dated at *H. in the East Indies*, and be alledged at *H. in com. Middlesex.* Upon oyer the defendant may demur, or plead in abatement for the variance. *R. Sal. 659.*

So, if a fact be alledged at *H. in partibus transmarinis, viz. apud Lond.* or other place within the realm, it will be bad; for it is repugnant. *R. Lut. 950.*

So, if a fact be alledged at a place out of the realm, without more, it will be bad; because it is impossible to be tried. *R. Mo. 851.*

But in a transitory action, if the defendant make a local justification, and traverses all the places, except that in which he justifies, the plaintiff must prove the cause of action out of that place: as in trespass for a false imprisonment, if the defendant justifies as constable of *D.* in another county, and traverses every

every other place out of *D.* the plaintiff must prove an imprisonment out of *D.* *Co. Lit.* 282. *b.* *Lut.* 1437.

In trespass for taking of goods, if the defendant justifies for *damage-feasant* in such a close or house, he must traverse all other places. *Co. Lit.* 282. *b.* *Lut.* 1437.

In an action upon the case for words, spoken in *London*, if the defendant plead a concord for all words, except in *London*, he must traverse the speaking there. *Lut.* 1437. *Co. Lit.* 282. *b.*

In debt upon a bond, if the defendant plead duress of imprisonment, in another county, it shall be tried where the duress is alledged. *Dal.* 18.

If he plead infancy, *viz. apud. A.* in another county; for it shall be tried where he is commorant, not where the action is brought. *R. Ray.* 458. *Vide 2 Jon.* 171. * But the usual way is to plead it where the action is brought. *Morgan's Vade Mec.* 1 vol. 56.*

Yet in actions transitory, if the defendant has a justification which is not local, he must alledge it in the same place and county, where the action is brought: as, in trespass for a battery at *A. in com. B.* if the defendant plead *son assault demesne*, he must plead it at *A.* and not elsewhere. *Lut.* 1437. *Co. Lit.* 282. *b.*

In an action against an executor for goods sold at *A.* if the defendant plead, that the testator was alive the day of the writ purchased, *viz. at D. in com. prad.* it is bad; for he ought to alledge his life at *A.* *R. Lut.* 14.

So, in an action founded upon a matter in several counties, if the issue be confined to a thing in one of the counties, it ought to be tried there: as, in covenant upon a lease in *com. H.* of a house in *com. B.* brought in *com. H.* if the breach be for not repairing, and issue upon it, it is bad, after verdict; for the action should have been in *com. B.* *R. 1 Lev.* 114.

So, in debt for an escape in one county, upon an arrest in another, if the issue be upon the arrest, it must be brought and tried in the county where the arrest was. *1 Lev.* 114.

If the issue be upon the escape, the action should be brought in the county where the escape was. *1 Lev.* 114.

So, in an action for words in *London*, if the defendant justifies by reason of a felony, perjury, &c. in another county, the trial must be in the county, where the felony, &c. is alledged. *Vide 1 Sand.* 247. (a)

So, in covenant against the corporation of *Berwick*, upon a demise of lands in *Berwick*, brought in *York*, and issue upon expulsion, it shall be tried in the county next to *Berwick.* *Semb. 1 Mod.* 36. *1 Vent.* 58, 90. *1 Sid.* 381, 462.

By the rules appointed in *B. R.* and *C. B.* actions upon the case, trespass for goods, assault, or imprisonment, shall be brought

(a) Notwithstanding the authorities in support of this and the three preceding cases, there seems great reason to doubt the law as laid down in them, for it may be frequently impossible to guess what issue the defendant will take. *Vide 1 Morgan's Vad. Mec.* 58.

in their proper counties, except when the justices of *nisi prius* seldom come thither. *Comp. Attorn.* 286, 338. *Rule M.* 1654. *Mills* 11. *Vide Rules and Orders of C. B.* 11.

And an attorney who knowingly brings *traverse*, or trespass for goods, battery, imprisonment, or slander, in another county, except in cases to be allowed by the judges, shall be punished. *Comp. Attorn.* 286, 338. *Mills* 11, 12. *Vide Rules and Orders of C. B.* 11, 12. *But these rules are now disregarded. 1 *Crompton's Pract.* 109.*

By *Rule M.* 1654, unless it be for a cause before expressed, or for a cause to be allowed of by the judge of the court, and proved to be true, if a declaration be delivered upon the removal of an action by *habeas corpus* out of an inferior court, or upon the reversal of the judgment there, it shall be laid in the same county as before. *Mills* 18. *Vide Rules and Orders of C. B.* 18.

Or, if it be removed out of the court of *Canterbury, Southampton, Hull, Litchfield, or Pool*, it shall in personal actions be laid in the county of *Kent, Hampshire, York, Stafford or Dorset*. By *Rule M.* 1654. *Mills* 18. *Vide Rules and Orders of C. B.* 18.

(N. 13.) *Venue* changed.

*The *venue* may in general be changed in any action not local, on motion in court grounded on an affidavit that the cause of action (if any) arose in the county of *A.* and not in the county of *B.* (or elsewhere out of the county of *A.*) but the rule to change the *venue*, may be discharged, on motion, the plaintiff undertaking to give material evidence in the county where the *venue* is laid, and if, on the trial, he does not give such evidence, he will be nonsuited. 1 *Morgan's Vade Mec.* 59.*

*But the court will not discharge a rule obtained in the common affidavit, to change the *venue*, on an affidavit of the plaintiff, that his witnesses lived in *Scotland*, and will come to *Carlisle*, but not to *London*. 1 *Wilf.* 162.*

If the declaration be delivered seven days before the end of the term, or after, upon *affidavit*, that the cause of action, (if any there be) arises in such a county, the court before plea will change the *venue* the next term and the defendant shall plead as he ought before. *Comp. Att.* 286, 339. By *Rule M.* 1654. *Mills* 12. *Vide Rules and Orders of C. B.* 12.

Tho' the defendant comes in upon the *exigent*. *Comp. Att.* 286, 338. *Mills* 12. *Vide Rules and Orders of C. B.* 12.

*But if the declaration be delivered so early that defendant has eight days in that term, he cannot move to change the *venue* next term. *Asplin v. Gray*, *M.* 6 *G. Str.* 211. Nor can he move, &c. till his appearance be entered. *East* 24 *Car.* 2.*

*The common pleas would not formerly change the *venue*, after time to plead, nor even after a summons for it, tho' discharged; but would after order for imparlance. *Barnes* 478, 487, &c. But they will now by rule. *Mich.* 16 *G.* 2.*

*But

*But yet, if on order for time, defendant has consented to take notice of trial in the original county, the *venue* shall not be changed. *Barnes* 493.*

*Nor if he has consented to rejoin *gratis*, and take notice of trial at the *sittings after term*, or at the *sittings in term*; for there a trial would be lost, and therefore defendant's consent shall bind him. *Barnes* 493. *Cowp.* 511. But the *venue* may be changed after a judge's order for *taking notice* of trial in *Middlesex*. *Will.* 245. This must have been without specifying the *sittings*.*

*And in *Gomm v. Clendon*, in the exchequer, *East.* 1781. it was ruled by the barons, that the *venue* cannot be changed to an out-county after defendant is tied down by a judge's order to take short notice of trial within term. The motion being inconsistent with the judge's order.*

*It may be changed after time to perfect bail. *Barnes* 483.*

*But it cannot be changed after issue joined. *R. Hard.* 327.*

Nor regularly after plea pleaded.

*Yet if after rule to shew cause why the *venue* should not be changed, and before it is made absolute, the defendant inadvertently put in his plea, this shall be no waiver of the rule, and the plea may be withdrawn on payment of costs. *T.* 24 & 25 *G.* 2. *C. B.* *Herbert v. Flower et al. in Trover.**

*So it is said, that plaintiff must move to discharge the rule before replication or plea. *Dickenson v. Filber*, *Str.* 858. *Quare tamen*, as to the plea, for plaintiff may not have time, as defendant may give a plea at the same time he serves the rule to change the *venue*. 1 *Crompton's Practice*, 113. So the plaintiff himself cannot change the *venue* in personal actions, after the *essoin* day of the subsequent term after appearance, tho' he would pay costs, or give an *imparlance*. *P.* 21 *Car.* 2. *Pr. Reg.* 38.*

*But in a late case, where the *venue* had been changed from *London* to *Lincolnshire* by defendant, and plaintiff at the trial nonsuited, the nonsuit afterwards set aside, and a new trial granted; and on going down a second time the cause made a *remanet*, the plaintiff after all these proceedings moved to have the *venue* brought back to *London*, and it was granted: for *per* Lord Mansfield, the plaintiff may at any time move to amend his declaration by altering the *venue*, and it would be an idle circuitry to put him to do that; and if he is permitted *now* to bring it back, he does it at his peril; because, if he does not give material evidence in *London*, he must be nonsuited; and if it should appear to be a local action by statute, he will be nonsuited on the opening. *Bruckshaw v. Hopkins*, *Cowp.* 409. 1 *Will.* 173. *Str.* 1162, 1202.*

*And where a rule to change the *venue* in an action of *assumpsit* from *A.* to *B.* has been discharged on plaintiff's undertaking to give evidence of some matter in issue arising in *A.* the undertaking is complied with by proving a rule of court in *A.* that defendant shall be at liberty to pay money into court, tho' that

that rule was obtained after the discharge of the rule for changing the *venue*, the payment of money into court being an admission of the cause of action. *Watkins v. Towers*, 2 Term Rep. 275.*

*So also proving a deed enrolled of record in *A.* is a sufficient compliance with the rule. *Ibid.**

*The affidavit to change the *venue* must be positive; it must say "the cause of action," &c. not "the promises," &c. *Barnes* 477, 478.*

*That the words in the declaration, &c. is bad; the words must be mentioned. *Barnes*, 480.*

*But the affidavit of one defendant is sufficient. *Ibid.* 482.*

*And the *venue* may be changed without affidavit, if it appear on the declaration, that the cause of action arose elsewhere, as action on the custom of a borough. *Barnes* 492.*

*And if there be a motion for changing the *venue* after the time in which the plaintiff might demand a plea *ad intrandum*, according to the term at the top of the declaration, the defendant in his affidavit shall say, when the declaration was delivered. *Mod. Ca.* 175.*

*But the court will not change the *venue* but into a county where the whole cause of action is sworn to arise. 1 *Wils.* 178. *Bristol v. Tito*, T. 8 G. 2. B. R. H. 135.*

*Nor then, unless it is a place where the judges-go; nor if it will delay trial, as to either of the three Northern counties preceding the spring circuit; nor to an adjoining county without notice and consent. 1 *Wils.* 138. *Dale v. Stevenson*, H. 9 G. 2. B. R. H. 210. *Howarth v. Willet*, Str. 1180. *Barnes* 490.

*Nor can it be changed into a third county without consent. *Str.* 1216.*

*And in general the *venue* shall not be changed from a county at large into a city and county. 2 *Barnes* 388, 489.*

*But it has been changed from a county at large into the city of London. *Barnes* 482. *Salk.* 670.*

*It may be changed from one county and city into another county and city. *Pract. Reg. C. P.* 429.*

*Yet, the court has refused to change it from London to a city a county of itself. *But see* 4 B. M. 2447, which seems contra. Nor where the cause of action arose in such city, can it be changed to the county at large. *Barnes* 482, 477, 489.*

*It cannot be changed into Hull, Canterbury, &c. because it is not known when an assize will be held there; nor into the city of Worcester or Gloucester out of the county at large, because the assizes for the city and county at large are held at the same place. But all this is in the discretion of the court. *Barnes* 490.*

*On motion to change the *venue* from Bristol into the adjacent county, the court said, take a rule to try the cause in the next county; the way is not to change the *venue*, but to try it in the next county. 1 *Wils.* 77.*

*If the cause of action arise in Wales, and the *venue* be laid in London, the court will, on affidavit, order the *venue* to be changed into the next English county; and the motion must be to change it

it into the *Welsh* county, and not into the adjoining *English* county, because the affidavit must express in what county, and not *elsewhere* the cause of action arises: but after the venue is so changed the cause may be tried in the next adjoining *English* county; and therefore it cannot be changed out of the adjoining *English* county into *Wales*. 2 Bl. Rep. 962. Vid. *Ld. Ray.* 1418. 2 Str. 1270. 4 B. M. 2450.*

*But it is not yet settled whether the court can change the venue from an *English* to a *Welsh* county. *Dougl.* 249, 262.*

*When a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next *English* county, where the king's writ of *venire* runs, and not into a county palatine, tho' that be the next county. Therefore where the action arose in the city of *Chester*, and a fair trial could not be had there, the venue was awarded into the county of *Salop*. *R. v. Amery*, 1 Term Rep. 363.*

*Yet there is a case where the venue was changed into *Chester*, because the court can send down the record by *mittimus*. Lord Raym. 1418. 1 Wils. 122.*

*But *per Buller* Justice, there is no instance but this of the court having sent a record by *mittimus* to be tried in a county palatine, where the cause of action did not arise there, and it is very doubtful whether the court have power to do it. 1 Term Rep. 368.*

*So in an action for words laid in *London*, on affidavit that they were spoken, if at all, in the county of *Lancaster*, the venue was changed into the next county, viz. *York*. 12 Mod. 313.*

*In transitory actions the court ought to change the venue, when it appears on the circumstances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at least a satisfactory trial cannot be had. 3 B. M. 1564. *Corwp.* 510.*

*So, if an action be brought in the county of a town, for a duty claimed by the corporation, the venue may be changed to the next county. *Mayor of Poole v. Bennet*, Str. 874.*

*But to have the venue changed from a city a county in itself, in an action where the mayor, &c. are plaintiffs, there must be affidavit that the sheriff is an officer of the corporation. 1 Wils. 298.

If a new trial is granted, because the verdict was against the weight of evidence, and the damages excessive, and there is proof of general prejudice in a city against defendant, the court will change the venue. 3 B. M. 1564.

But in a transitory action, if the county in which the cause of action really arose, be improper to try it in, the venue shall not be changed; as, on a bye-law of a city; nor can it be changed into the adjoining county, from the form of the affidavit. 4 Bur. 2447, 2450.

*Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter cannot be tried at all,

all, or cannot be fairly and impartially tried, in the *proper* county, it shall be tried in the next adjoining county. 3 B. M. 1333.*

*This may be done without changing the *venue*, by entering a suggestion on record, with the leave of the court," That there cannot be a fair and impartial trial had in the county where the cause of action arose, "with a *nient dedire* thereupon, and therefore praying that the *venire* may be directed to the sheriff of the next county. *Id. Ibid.**

*But as the party cannot traverse this suggestion, when entered by rule of court, there must be a clear and solid foundation for it. It must not rest on mere supposition and belief. *Id. ibid.**

*If the cause of action arises in *Berwick*, the *venue* should be in *Northumberland*. 2 Black. Rep. 1036.*

*And in actions where it is not usual to change the *venue*, the court will do it on special grounds, as if both plaintiff's and defendant's witnesses live in the county, into which it is prayed the *venue* may be changed: but they will not change it if only defendant's witnesses live there. 1 Term Rep. 781.

*If the plaintiff be a barrister or attorney, and lay the *venue* in *Middlesex*, it shall not be changed. So a serjeant at law has the like privilege in C. B. So a master in chancery. 2 Show. 176. 1 Mod. 64. Styles 460. 2 Lord Raym. 1556. Str. 822. 1 Wils. 159.

*But if they lay the *venue* in *London* it may be changed. Salk. 668. Barnes 479.*

*And in C. B. if a serjeant at law, or an attorney be plaintiff, and sue by *capias*, and not by writ of privilege or attachment, the *venue* may be changed. Prac. Reg. C. P. 420, 419. Barnes 346, 338, 479, 484.*

So where an attorney was plaintiff, and it appeared that the matter arose and all the witnesses lived in remote parts of the kingdom. Barnes 482.

*A clerk of assize brought an action for assault and battery committed in *Kent*, and laid the *venue* in *Middlesex* on common affidavit, the *venue* was changed; but on motion for the plaintiff the rule was set aside, and the *venue* brought back into *Middlesex*. Knight v. Barnaby, 2 Ld. Raym. 1253. Salk. 670. For the clerk of assize is clerk to the judge of assize, and bound to attend him at the assizes in the county, and at *Westminster*, to return *postea*.*

*And by *Powell* justice, the privilege of laying the *venue* in *Middlesex* extends to judges clerks as well as to serjeants at law, barristers and attornies. Salk. 670.*

*But the *venue* shall not be changed because the defendant is an attorney, and the action not laid in *Middlesex*; for the plaintiff may bring a personal action where he pleases. R. Sho. 148. Carth. 126.*

*The *venue* shall not be changed to *Middlesex* because some of the defendants are barristers or attornies. Str. 610.*

*On

*On changing the *venue* against an attorney, costs of a new bill are not paid. *Barnes* 485, 486.*

*And where all such persons sue or are sued in *auter droit*, as heirs, executors or administrators, they lose their privilege. 1 *Crompton's Practice*, 116.*

*The *venue* shall be changed in *scandalum magnatum*. 1 *Sid.* 185. *Cont.* 216. *Cont.* 1 *Lev.* 56. *Cont. Vent.* 363, 364, 365. *Cont.* 2 *Jones* 192. *Cont. Carthew* 400. *Cont. Skin.* 40. *Cont. Salk.* 668. *Vid. Str.* 807. *Lord Raym.* 1418. *Barnes* 482.*

*So it may, *upon cause*, in any action not local. *Semb. Hob.* 37.*

*In *trover* for silver or money only. *R. Hil.* 4 *G. in C. B.**

*So the *venue* was changed from *London* to *Middlesex*, because all the sittings in *London* were on a *Saturday*, and his witness was a *Jew*. 2 *Mod.* 271.*

*It may be changed in an action against the late sheriff, tho' his under-sheriff is still under-sheriff, but the jury-process shall be directed to the coroners. *Barnes* 493.*

*But the *venue* shall not be changed where the action is local. *Hob.* 37.*

*It may be changed in local as well as transitory actions on occasion. *Per Lord Mansfield, Loft* 50.*

*Not in deceit. 1 *Sid.* 87. *Contra infra*.*

It may in deceit, by warranting an unsound horse. *Barnes* 491.*

*But not in an action of covenant on deed, for non-payment of rent. *Barnes* 491.*

*Nor in *C. B.* on a promissory note. *Sayer* 7. 2 *Black. Rep.* 993.*

But in *B. R.* it may. *Wilf.* 173. Yet this seems doubtful, for it depends on the same principle as a bill of exchange.*

*Nor when any thing material for the maintenance of the action was in the county where the action is brought. 1 *Vent.* 344.*

Nor if the plaintiff undertakes to give evidence in that county. *Per Cur.* 7 *Ann.**

*Nor in *trover* for goods. *R. Hil.* 4 *G. in C. B.**

*Nor in covenant. *R.* 1 *Lev.* 307.*

*Nor in an action on the case for an escape. 1 *Sid.* 87. *Salk.* 670.*

*Nor in an action on a statute; for by *stat.* 21 *Jac. c.* 4. the defendant shall be found not guilty. 1 *Sid.* 287.*

*Tho' the matter arises in *London*, and by charter, a thing which concerns the city, shall be tried there. *R. Hard.* 327.*

*Nor in an action on the statute of usury. *Andr.* 66.*

*Nor in an action for a false return. *Salk.* 669.*

*Nor for a carrier, for the neglect is transitory, and not material where it was. *Salk.* 670.*

*Nor in debt. *Str.* 878. Nor on any specialty, nor on a bill of exchange. *Barnes* 491.*

*Nor

*Nor where the declaration contains a promissory note, *inter alia*, plaintiff undertaking, on pain of non-suit, to give evidence on it. *Id. ib.**

*Nor in *scandalum magnatum*, unless for special cause, as in Lord *Shaftebury's* case, where the venue was changed from *London* to *Middlesex*, by reason of the great influence he had in *London*. *Carth. 400. Duke of Norfolk v. Alderton.**

*Nor in an action for a libel in a newspaper which has been circulated in other counties. *1 Term Rep. 571.* Nor in a letter written in one county and directed into another. *Id. 647.**

Vide more concerning title *Action*, in the following titles; *viz.*
Admiralty, (F. 11.)—*Arbitrament*, (I. 1, &c.)—*Battery*, (E. 1.)
 —*By-Law*, (D. 1.)—*Chafe*, (H. 5.)—*Copyhold*, (H. 6.—K. 22, 26.—R. 13, &c.)—*Costs*, (A. 5.)—*Forcible Entry*, (C.)—*Forgery*, (B. 1.)—*Imprisonment*, (L. 2.)—*Leet*, (O. 4, &c.)
 —*London*, (N. 1.)—*Officer*, (K. 15.)—*Release*, (E. 3.—*Scawers*, (I. 1.)—*Toll*, (H. 2.)—*Utlagary*, (D. 2, 3.)

For the different Kinds of Actions.

Vide their several proper titles.

Action by, and against an Executor or Administrator.

Vide Administration, (B. 13, 14, 15.)—*Pleader*, (2 D. 1, &c.)

Chose in Action.

Vide Assignment, (C. 1.)—*Grant*, (D.)

Joinder in Action.

Vide Baron and Feme, (V. &c.)—*Parceners*, (A. 4, 5.)—*Abatement*, (E. 8, &c. F. 4, &c.)

Limitation of Actions.

Vide Temps, (G. 1, &c.)—*Action upon the Case upon Assumpsit*, (D.—H. 6, 7.)

Proceeding, and Pleading in particular Actions.

Vide Pleader, (2 A. 1, &c. to the end of the title.)

(A) When it lies.

AN action upon the case is an action founded upon a wrong, and concludes *contra pacem*. Vau. 101. F. N. B. 92 E. (a.)

And, it is not brought upon a writ formed in the Register, but the writ varies according to the variety of the case. 8 Co. 48. a.

Yet it is an action allowed, and contained in the Register. 4 Co. 94. b.

In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages.

As, if *A.* has a colliery, and *B.* stops up a highway near it, whereby nothing can pass to his colliery, an action upon the case lies; for he ought to be remedied in particular, tho' it was a highway for all. *Cont. (but the judgment reversed.)* Sal. 15.

If the parishioners of *B.* ought to pass a ferry toll-free, every parishioner shall have an action against the owner of the ferry, to assert that right, where he has a particular loss. *Semb. 2 Mod. Ca. 352, 355. Vide post, (B. 2.)*

So, if a parishioner be excluded the vestry, he shall have an action upon the case, if he shews a right to be in the place where the vestry assembled. *R. 2 Mod. Ca. 355.*

So, for a malicious prosecution from malice, and without probable cause; but malice, either express or implied, and want of probable cause, must both concur. 4 Bur. 1974.

*And malice may be inferred from the want of probable cause, but the want of probable cause cannot be inferred from malice. *Semb. 1 Term Rep. 518.**

*And in every action of this sort, the plaintiff must shew what became of the original prosecution, either that it was deserted, or that he was acquitted. *Id. 520.* So held by Lord Kenyon at *nisi prius*, Easter term 1789. *Dougl. 215.**

So, for maliciously suing out a commission of bankruptcy, the plaintiff is not confined to the penalty of the bond, but may have his action on the case for damages. 3 B. M. 1419.

*So it lies against a governor for maliciously suspending the plaintiff from a civil office, by which he lost his fees. *Sutherland v. Murray, 1 Term Rep. 538.**

*So, for maliciously obtaining and executing a warrant to search a house for smuggled goods, where none such are found. *Cooper and another v. Boot, Id. 535.**

(a) Mr. *Morgan*, in his *Vad. Mec.* vol. 1. 65. says that this is a mistake, for that actions, *contra pacem*, are a species of actions *vi et armis*; certain it is that the *writ* in *Fitzherbert* does conclude *contra pacem*; the writs in the Register are all in trespasss *vi et armis*, and therefore no conclusion can be drawn from them; and no doubt, whatever be the true form of the *writ*, the declaration is as Mr. *M.* suggests.

*So for suppressing material facts in the return to a *mandamus*, if the return be false in substance; tho' it be true in words. *Dougl.* 158, 159.*

*So it lies against the bank, &c. for refusing to transfer stock. *Id.* 524.*

*So for a fraud on a corporation to avoid toll, the remedy is by a special action on the case. *Cowp.* 664.*

*So when goods are delivered to a wharfinger or carrier, and they are lost or stolen, case is the proper remedy, and not *trover*. *5 Bur.* 2827.*

It lies against an officer for seizing goods *absque probabili causa*. *Israel v. Etheridge, in Sc. T.* 1721. *Bunb.* 80.]

[For fees due to the usher of the black rod. *Saunderson v. Brignall, H.* 13 G. Str. 747.]

[In case of a simple *depositum* without reward, the law raises a promise not grossly to neglect or abuse the deposit, and if it is abused, action on the case lies: *Mytton v. Cock, M.* 12 G. 2. Str. 1099.]

[It lies against paviers acting under commissioners in an act of parliament for paving the streets, for raising the ground so as to obstruct the passage and light of plaintiff's house. *Leader v. Moxon, M.* 14 G. 3. 3 *Wils.* 461.]

So, if the wrong of another is not directly done by a man, but is the consequence of a lawful act by him, he ought to have an action upon the case. *R.* 2 Mod. Ca. 272. *Vide Trespass, (D.)*

[When an act is not immediately, but only in consequence, injurious to the plaintiff, *case* is the proper remedy; when the act is immediately injurious to the plaintiff, *trespass*: *Howard v. Banks, M.* 1 G. 3. 2 B. M. 1113. *Harker v. Birkbeck, T.* 4 G. 3. 3 B. M. 1556.]

[Thus, for damage done to plaintiff's colliery, by what defendant has done in his own colliery, within his own soil, though several other collieries lie between them: and trespass *vi et armis* will not lie, for the damage is not immediate, but consequential. *Howard v. Banks, M.* 1 G. 3. 2 B. M. 1113.]

[So, if A. brings rude persons into a vintner's house, and procures them and the mob to cry "A bawdy-house," by which the mob threw stones and broke the windows, action upon the case lies, for this made the vintner liable to a prosecution for a disorderly house; for this would have been evidence of it. *Plunket v. Gilmore, H.* 10 G. Fort. 211.]

(B) When it does not lie.

(B. 1.) When there is no temporal Damage.

BUT an action upon the case does not lie, when there is not any temporal damage; as, against a woman, who pretends herself single, and inveigles a man into a marriage, whereby he

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was disturbed in conscience. *R. 1 Lev. 247. Vid. Ent. 13. Vide 1 Sid. 375.*

Nor does it lie, for refusing to administer the sacrament. *Semb. 1 Sid. 34.*

Nor, for not reading divine service to him, and the tenants of his manor. *R. 5 Co. 73. a. 1 Rol. 110. l. 12.*

Nor, for a legacy; for it is only due by the spiritual law. *R. Ray. 24. 1 Sid. 46.*

*Nor by a master, for beating his servant; nor by a father, for beating his child, unless it be added, *per quod servitium amisit.* 3 *B. M. 1879.**

*Nor by a father, for assaulting his daughter, then in the service of another person, and getting her with child, tho' it be added, *per quod the father servitium amisit.* *Id. ibid.**

(B. 2.) When there is no particular Damage.

So, an action upon the case does not lie, when there is no particular damage to any one, but it is common to many: as for not reading divine service to the tenants of his manor; for if one may, all may have an action. *R. 5 Co. 73. a. 1 Rol. 110. l. 12.*

So, it does not lie for a common nuisance without a particular damage. *Co. Lit. 56. a. Vau. 341. Dan. 172. Vide Action upon the Case for a Nuisance, (C.)*

So, it does not lie by an inhabitant of *A.* for not keeping a common ferry, in which all the inhabitants by custom ought to pass toll-free: for every subject has the same cause for an action. *R. Sho. 157. 1 Sal. 12, 16. 3 Mod. 289. Vide ante, (A.)*

So, it does not lie, where the particular damage is not specially alleged. *1 Sal. 16.*

As, if there be an action upon the case for stopping up a highway, whereby buyers could not come to his coal-pit; for he ought to say, that buyers were coming, and were hindered. *Court divided, 1 Sal. 16.*

So, an action upon the case does not lie against a sheriff for not seizing the goods of the party, after a *capias utlagatum* delivered to him; for that goes to the king's loss. *R. 2 Vent. 89, 90.*

(B. 3.) For an Act not prohibited by Law.

So, it does not lie for an act not prohibited by law, tho' it be to the damage of the party: as, if a lessee at will by negligence burn his house, an action upon the case does not lie; for the law does not punish him for permissive waste. *R. 5 Co. 13 b. Cro. El. 777, 784. 4 Mod. 12. Vide Action upon the Case for Misfeasance, (A. 6.)—For Negligence, (A. 6.)—Vide Estates, (H. 5.)*

If a man erect a dove-cote, or coney-borough in his own land, tho' the doves, or conies hurt the neighbours. *R. Mo. 420, 453.*

If

If a man shut the doors of his house against the sheriff, who comes to do execution of the goods of another, which are in his house. *R. 5 Co. 91. Mo. 668.*

If a master gives correction to the son and heir apparent of *B.* who was his apprentice, whereby he becomes lame, and is disparaged in his marriage, *B.* cannot have an action upon the case. *R. 1 Lev. 50.*

*So no action lies for giving a *true* character of a servant on application made to his former master, to enquire into his character, with a view of hiring him; unless there should be extraordinary circumstances of express malice. *4 B. M. 2425.**

*Nor against a *peace-officer*, for arresting a person *bonâ fide*, on a charge of felony without a warrant, tho' it turn out that no felony was committed. *Dougl. 359, 360.**

*So, no action lies against an auctioneer for selling a horse, or any thing else at the highest price bid, contrary to the owner's express directions not to let him go under a larger sum named. Otherwise, if the owner had directed the auctioneer to set the horse up at such a particular price, and not lower. *Coxw. 395.**

If a man enter a *caveat*, whereby any one intitled by the king's patent is put to a charge in obtaining administration. *1 Sal. 37.*

[It does not lie against an officer for reducing a serjeant to be a common soldier, out of the king's dominions in time of war, *Barv. v. Keppel, T. 6 G. 3. 2 Wils. 314.*]

Nor against a commander of a squadron for a malicious prosecution before a naval court-martial, for an offence cognizable therein.

*Nor for delaying to bring an officer under an arrest to a naval court-martial, it being a military offence; so held expressly, if the defendant has not been tried for it by a court-martial. *1 Term Rep. 548. Qu. if the defendant had been tried and found guilty.**

(B. 4.) Where the Damage happens by the Default of the Plaintiff.

So, it does not lie, where the damage happens by the negligence, or default of the plaintiff himself; as, if a man agree with *B.* to carry timber to *D.* to be laid in such a place, as he should appoint; an action upon the case does not lie for not appointing a place, whereby his horses are spoiled. *R. 2 Lev. 196. 1 Vent. 310.*

(B. 5.) For an Act of another Nature.

So, an action upon the case lies not for a wrong, which is a felony; as, if a man kill the servant of another, an action upon the case does not lie by the master *per quod servitium amisit*. *Per three J. Yel. 90. Per Twissd. 1 Sid. 375. 1 Lev. 247. Vide Trespass, (D.)* (B. 5.) As, for felony; &c.

*Nor does it lie against the post-master general for the value of a bank-note stolen by one of the sorters of the post-office, out of

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of a letter delivered into the office. *Lane v. Cotton*, 1 Lord Raym. 646. *Whitfield v. Lord Le Despencer*, Cozup. 754.*

Or, for the battery of his wife, by reason of which she languished for six months, and then died. R. 2 Rol. 557. l. 5. *Vide Tel.* 89, 90.

So, it does not lie against an husband and wife, for that the wife affirmed herself to be sole, and married the plaintiff. R. 1 Lev. 247.

(B. 6.) So, it does not lie for a mere trespass; as, for pulling down a wall, and taking off the tiles from an house, unless it be alledged, that the timber was thereby rotted. *Semb.* 1 Rol. 104. l. 5.

For a bare trespass. *Vide in Trespass, (D.)* So, if a miller take toll of one, who is toll-free; an action upon the case does not lie, but trespass. 1 Rol. 105, l. 5. 2 Rol. 556. l. 10.

So, if a man take his corn.

Or, if a miller take more for toll than he ought. 1 Rol. 105. l. 5. l. 30. 2 Rol. 556. l. 10.

So, if a man enter my land, and do a nuisance there. 1 Rol. 105. l. 25.

[So if *A.* and *B.* sign an agreement without stamps, "That *A.* sets and lets to *B.* and partners, to raise lead ore in a plat of ground, *B.* agrees to pay *A.* every sixth pig; *A.* agrees to let said partnership have the said ground during all his term, and *A.* is to carry one eighth part of the bargain." And on this *B.* works and gets ore, and *C.* a stranger works and gets ore, case lies not for *B.* against *C.* it must be trespass. *Harker v. Birkbeck*, T. 4 G. 3. 3 B. M. 1556.]

(B. 7.) So, it does not lie for perjury of a witness, whereby the plaintiff recovered less damages in an action of trover. *Per three J.* *And. cont.* Cro. El. 520. Ow. 158. *Vide post.* (B. 8.) *Vide* 2 *And.* 47.

(B. 8.) When another Remedy is given.

Nor, when the law has provided another remedy.

In chancery; as, if feoffees to an use at common law refuse to make a feoffment, join in voucher, &c. an action upon the case does not lie, for they shall be compelled in *chancery*. 1 Rol. 108. l. 35, 45.

If the lord of a manor refuse to hold a court, or to admit upon a surrender. 1 Rol. 108. l. 20, 30. *Vide Action upon the Case for Negligence*, (A. 2.)

So, if a tenant of a manor refuse to take a surrender according to the custom. R. 1 Rol. 108. l. 40.

Or, *in parliament*; as, for a false return of one elected a burgess for parliament; for, that is cognizable in parliament; unless it be upon the St. 23 H. 6. 15. *Vide Action upon the Case for Deceit*, (A. 6.)—*For Misfeasance*, (A. 1.)—*For Negligence*, (A. 2.) R. where the action was before the determination of the election in parliament. *Lut.* 89.

So, for a double return made *malitiose*, an action upon the case does lie by the common law. *R. 2 Vent. 37. 2 Lev. 114. R. 3 Lev. 29.*

So, after a determination in parliament, the party against whom it was determined, cannot have an action upon the case for a false return against the officer, who returned another elected. *Lut. 89.*

So, when a remedy is provided by statute; as if a statute prohibits the importation of cards without licence, &c. An action upon the case does not lie, by any who has the king's licence, against the importer, for a damage to him. *1 Rol. 106 l. 10.*

So, an action upon the case does not lie for perjury, whereby a verdict passed against him; for he ought to sue upon the *stat. 5 El. Per three J. 2 And. 47. Vide ante (B. 7.) Vide Cro. El. 520.*

Nor, for a false oath in *chancery*, or in an *affidavit*, &c. for the party shall have a remedy in the star chamber, or elsewhere. *R. 2 Rol. 195, 198.*

(C.) Proceeding in an Action upon the Case.

(C. 1.) The Original.

BY the *stat. 19 H. 7. 9.* The like process shall be in actions upon the case in *B. R.* and *C. B.* as in trespasss, or debt.

And therefore, the process shall be attachment, distress, *capias*, and so to outlawry.

If an action upon the case be commenced in *B. R.* by original, the defendant may be outlawed.

(C. 2.) The Declaration.

In an action upon the case, the original contains the whole case.

And the course was to recite the original in the declaration.

But now in *B. R.* and *C. B.* by rule of court, the declaration need not repeat the original writ, but shall say only, *A. queritur, &c. in placito transgress. super casum*, or *attachatus fuit ad respondend. B. in placito transgress. super casum. Compl. Att. 298, 344. Vide Rules and Orders of C. B. 26.*

So, if the writ be recited to be in *placito transgress.* and the declaration be *transgress. super casum*, it is good; for in *placito transgress.* extends to trespasss upon the case, as well as trespasss. *R. Cro. Car. 254. D. Hob. 180. R. Cro. Car. 325.*

So, if the declaration begins, *quod cum, &c.* and concludes *per quod, &c.* this seems a declaration in an action upon the case, tho' it has the words usual in trespasss. *R. Al. 84. R. 3 Lev. 338.*

A declaration in an action upon the case generally omits *vi et armis.* *F. N. B. 86. H. 42 Aff. pl. 9. 1 Rol. 1. l. 23.*

(C. 3.)
When it omits *vi et armis.*
And

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And therefore, in an action upon the case for negligence, or non-feasance, if the declaration be *vi et armis*, it is bad. *R. 9 Co. 50. b.*

So in an action upon the case for stopping a watercourse in his own land. *Per two J. Pop. 170, 171.*

Or, for erecting a gate, whereby he was hindred in his way to his close. *R. Godb. 54.*

So, in an action upon the case for the disturbance of a liberty; as, for disturbing one in his seat in a church. *R. Per two J. Haught. cont. 2 Rol. 139.*

But, an action upon the case for a misfeasance, which is the cause, but not the very point of the action, may be alledged *vi et armis*: as, in an action for a disturbance to hold a court, *per quod* he lost his fees, the disturbance may be alledged *vi et armis*, *R. 9 Co. 50. b. (a.)*

So, in an action upon the case for a *rescous*, the *rescous* may be alledged *vi et armis*. *R. Jape Hob. 180.*

So, for chasing his cattle. *R. Cro. Car. 325.*

For disturbing him in the profits of a fair. *2 Rol. 139. 2 Cro. 122.*

For disturbing him in his way. *2 Rol. 139.*

(C. 4.)
And *contra*
pacem.

So, a declaration, in an action upon the case for negligence, or non-feasance, shall not say *contra pacem*. *R. 9 Co. 50. b.*

But, an action upon the case is founded upon a wrong, and may conclude *contra pacem*. *F. N. B. 92. E. Vau. 101. (b.).*

And therefore, where it may say *vi et armis*, it may conclude *contra pacem*.

ACTION upon the Case upon *Assumpsit*.(A) When an *Assumpsit* lies.

(A. 1.) Upon an implied Promise.

AN *assumpsit* lies upon every executory promise not performed, made upon a good consideration,

Tho' the promise be not made by express words.

As, upon every contract executory, each party shall have an *assumpsit* against the other, who does not perform his part of the contract, and shall recover the whole debt, besides his special loss, in damages. *R. 4 Co. 94. Mo. 433, 667, Slade. R. 2 Cro. 544. R. Jon. 146.*

*It lies for goods sold *abroad*, which are *prohibited* here, if the delivery of them be *compleat abroad*; tho' the vendor may know they are intended to be run into *England*.*

*Otherwise, if the vendor was to *deliver* the goods in *England*, or if they were only to be paid for, in case the *vendee* should succeed in landing them. *Cowp. 341.**

(a) But here *vi et armis* is introduced, not as constituting part of the form of the action, but as descriptive of some circumstances attending the particular case.

(b) Vide the note at (A.)

[*Assumpsit*]

[*Assumpsit* lies in many cases where debt lies, and in many where debt doth not lie. *Moses v. Macferlen*, P. 33 G. 2. 2 B. M. 1005.]

[It lies where defendant is under an obligation from natural justice to refund; for the law implies a debt, and gives this action *quasi ex contractu*. *Ibid.* & *Cowp. 290, 294.*]

[It lies for money recovered by judgment of a court having jurisdiction, not on a ground that the judgment is wrong, (for till set aside or reversed it is conclusive as to the subject matter of it) but because defendant ought not in justice to keep the money, for a reason of which plaintiff could not avail himself against that judgment. *Ibid.*]

[A. makes notes to B. who indorses them to C. that he may recover of A. C. signing agreement that B. should not be liable to pay, nor suffer for such indorsement. C. sues B. in court of conscience, who refuses to admit defence of this agreement, thinking they have not power to judge of it, and decree B. to pay C. which he does: *assumpsit* for money had and received to his use, lies, *Ibid.*]

[This kind of action lies only for money which *ex æquo et bono* defendant ought to refund; for money paid by mistake, or on a consideration which happens to fail; for money got through imposition (express or implied) or extortion or oppression, or undue advantage taken of plaintiff's situation: but NOT for money paid by plaintiff, and claimed of him as payable in point of honour and honesty, though not recoverable by law, as a debt barred by statute of limitations, or contracted during infancy, or to the extent of principal and legal interest on an usurious contract, or for money fairly lost at play; for in such cases defendant may in conscience retain, though by law barred of recovering. *Ibid.*] **Vide etiam* 1 Term Rep. 286, *Bize v. Dickason*.*

*But it lies for money paid by *mistake*, or upon a consideration which happens to fail, or for money got thro' *imposition*; (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. *Ibid.**

*Where money is extorted by duress of goods; as where the plaintiff pledged goods with the defendant for 20*l.* and defendant refused to deliver them unless he received 10*l.* for the interest; plaintiff offered 4*l.* knowing *that* to be more than legal interest, but afterwards to obtain his goods paid the 10*l.* and brought his action for the surplus: plaintiff is intitled to recover, notwithstanding his tendering something *more* than the legal interest. *Atley v. Reynolds*, Str. 915.*

[In action for money had and received, plaintiff can recover only what he is in conscience intitled to: therefore defendant may give in evidence all reasonable allowances out of the very sum demanded, without pleading it or giving notice of set-off. *Dale v. Sallet*, M. 7 G. 3. 4 B. M. 2133.]

It lies for arrears due upon an account. R. Tel. 70. Adm. 1 Rel. 23 l. 47. Mo. 854. 2 Cro. 69. Dan. 26.

So, if a man receive goods, or money, to my use. *Vide* 37 *Eliz.* 1 *Rol.* 27. l. 45. But *R. acc.* 14 *Jac.* 1 *Rol.* 7. l. 10. and in 1651. 1 *Rol.* 32. l. 30. *Dan.* 26.

So, upon a submission to an award, each party shall have an *assumpsit* against the other, who does not perform the award. 1 *Rol.* 7. l. 15. *Vide Arbitrament*, (I. 3.)

So, for a fine due to the grantee of the king *pro licentia concordandi*, an *assumpsit* lies. *Per two J.* 2 *Leo.* 179.

[For petty customs; for they may be granted, and so plaintiff may prescribe for them. *Exeter v. Trimlet*, T. 32 & 33 G. 2. *Tarmouth v. —*, T. 3 G. 3. 2 *Wils.* 95. **Vid.* 1 *Term Rep.* 616.*

Or for a fine assessed for admittance to a copyhold. *R.* 2 *W. & M. B. R.* 2 *Vent.* 175. *Per three J.* *Holt cont.* 3 *Lew.* 261. *Sho.* 35. 3 *Mod.* 240. 2 *Carth.* 91. *Vide Copyhold*, (H. 6.) **Vide Evelyn v. Chichester*, 3 *Bur.* 1717. *Acc.* *Doug.* 728.*

So, for the duty of scavage due by the custom of London. *R.* 1 *Vent.* 298. *Lew.* 174. 3 *Lew.* 262. *Carth.* 92. *Sho.* 35.

So, for a penalty forfeited upon a by-law. *R.* 2 *Lew.* 252.

So, for fees due to him upon the knighthood of the defendant. *R. Sho.* 78. *Carth.* 95.

So, by an insurer of a ship, for the *premium* for which he insured. *Carth.* 338.

[So, if *A.* pays money to *B.* on a promise to transfer stock at a future day, which is not done. *Dutch v. Warren*, M. 7 G. *Str.* 406.]

[So, if *A.* pays money to *B.* on a contract for old stock, and *B.* delivers him additional stock. *Anon.* M. 7 G. *Str.* 407.]

*So, for money lent at the time and place of play, for *stat.* 9 *An. c.* 14. against gaming, only renders the security void, but does not affect the contract. 2 *Bur.* 1082.*

**Qu.* Whether money lent to play with be recoverable?*

So, for money won at a play called *bazard*. *R.* 2 *Vent.* 175. *Dub.* 3 *Lew.* 118. *Cont. per tot. Cur. Lut.* 180. *Cont. in B. R.* H. 14 & 15 *Car.* 2. *Wiche's case.* *Semb. cont.* 5 *Mod.* 13. *R. cont. Mod. Ca.* 128. *Carth.* 338.

So, if a man receives the profits of an office upon pretence of a title, an *indebitatus assumpsit* lies by him who has the right to them, as for money received to his use. *R.* 2 *Mod.* 260, 263. 3 *Lew.* 262. *R.* 2 *Jon.* 127. 2 *Lew.* 244. *Dan.* 27. *Sho.* 35.

[Action for money had and received to plaintiff's use, must be brought against the principal not the collector. *Saddler v. Evans*, M. 7 G. 3. 4 *B. M.* 1984.]

[If the clerk of a company pays over the money received to the company, but does not enter it in the book, action does not lie against him: if he had not paid it over, it lies against him or against the company. *Cary v. Webster*, M. 8 G. *Str.* 480.]

*If money be paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, this action lies by the person who paid it against the agent—*The mere passing such money in account, or making rest, without new credit given,*
fresh

fresh bills accepted, or further sum advanced for the principal in consequence of it, is not equivalent to a payment over. *Cowp.* 565.*

So, in every case where an account would lie. *2 Mod.* 263. *Semb.* *1 Sal.* 9. *Vide infra.*

A fortiori, where there is an express promise to render an account. *R.* *1 Sal.* 9. *Per three J.* *Carth.* 89.

So, if *A.* give a bill upon *B.* for 100*l.* to pay to *C.* 60*l.* and *B.* indorses the 60*l.* upon it; he shall be charged for so much money to the use of *C.* *R. Mod. Ca.* 37.

So, in every case, where debt lies. *Semb. per Hale, Hard.* 486. *Vide Sal.* 23.

An *indebitatus assumpsit* lies against a father for medicines provided and delivered for his daughter. *R. Ray.* 67.

Or, for money promised upon the marriage of a relation. *R. cont.* *1 Vent.* 268. *D.* to be *R. acc.* upon a marriage with his sister. *1 Vent.* 311.

Or, for meat and drink for a bastard child. *Per Pemb.* *2 Sho.* 184.

Or, a matter of a charity. *2 Sho.* 184.

[If a tradesman pays once for goods delivered to a waterman, on trust, he shall be liable afterwards though he send the money by him to pay for them. *Hazard v. Treadwell, H.* 8 *G. Str.* 506.]

[The repairer of a ship has his election against the master who employed, or the owners, but if he undertakes it on a special promise of either, the other is discharged. *Garnham v. Bennet, M.* 2 *G. 2. Str.* 816.]

*So, where the plaintiff supplied a ship with *necessaries*, by order of the *master*, tho' the master was *lessee* of the ship for a term of years, under covenants that he should have the sole management, and employ her for his sole benefit, and that he should repair her at his own sole costs. And tho' such *necessaries* were furnished without the *knowledge* of the owners, or without their being known to the person who supplied them. *Cowp.* 636.*

*But if the person supplying such *necessaries* had notice of the contract between the owners and master there might be ground to shew he meant to absolve the owners. *Ibid.**

So, an *indebitatus assumpsit* lies against *A.* for money lent, or goods sold at his request to a stranger. *R.* *1 Vent.* 311. *Dan.* 27, 8. *R. cont.* *2 Vent.* 36. and there the case *1 Vent.* 311, which was by *two J.* the *Ch. J. cont.* and was after verdict, is cited; and thereupon *Ventris* makes a *quare.* *R. acc. Mod. Ca.* 77.

But, the declaration must be *indebitatus assumpsit* for money lent to *A.* for *mutuo dat'* to the stranger at *A.*'s request, is bad. *R.* *1 Sal.* 23.

[*Assumpsit* for money lent to a third person, at the request of defendant, lies not; and if on general issue to this among other counts, there is general verdict, and damages on all, judgment shall be arrested. *Marriot v. Lister, P.* 2 *G. 3. 2 Wils.* 141.]

*An

*An *indebitatus assumpsit* for money had and received to the plaintiff's use, does not lie for *East-India* or any other stock; the remedy must be by special action on the case, or in equity. 5 *Bur.* 2592.*

*Nor to recover back money paid for the *release* of cattle, damage-feasant, tho' the distress were alledged to be wrongful; the proper remedy is replevin or trespass. *Cowp.* 414.*

But, for rent arrear, the law does not imply any promise during, or after the term; for it favours of the realty. *R. 1 Rol.* 7. l. 25, 30. *Vide post*, (C.)

*But now by *stat.* 11 G. 2. c. 19. s. 14. where the demise is not by deed, the rent may be recovered in an action on the case, *viz.* *assumpsit* for use and occupation. And where the tenant has commenced a quarter, or half year, and quitted long before the expiration of the time, the plaintiff shall recover for the whole time the defendant ought to have occupied, if the landlord has not accepted the possession before the time expired. 1 *Morgan's Vad. Mec.* 80.*

So, where debt does not lie, *indebitatus assumpsit* does not lie (a); as, upon a wager, or mutual promise. 1 *Sal.* 23.

Or, a promise upon a consideration to pay a debt due from another. *Per Holt, Mod. Ca.* 129.

So, in every case, where a man is accountable to another, an *indebitatus assumpsit* lies against him for money received to his use: as if A. receive the rent of B.'s lands upon pretence of title, 2 *Mod.* 263. *Vide Account*, (A. 4.—D.)

So, if he receive money *ad computandum*, or *merchandizandum*, an *indebitatus assumpsit* lies. *R. 1 Sal.* 9.

So if A. sell an horse to B. and agree, that if he dislikes and re-delivers the horse to C. he should repay the money, otherwise A. himself would; upon re-delivery of the horse to C. an *assumpsit* lies by B. against A. for money received to his use. *R. 3 Lev.* 364.

So, in every case where a man pays money to another by mistake, an action lies for money received to his use. *Per Treby*, 1 *Sal.* 22. *Skin.* 411, 412.

*But an action for money had and received does not lie against an excise-officer, to recover back an over payment. *Cowp.* 69.*

Or, by the deceit of another; as if A. pay money upon a policy of insurance, in which he was bound when the ship was believed to be lost. 1 *Sal.* 22. *Skin.* 411, 412.

Or, for the *premium*, when there were no goods in the ship. *R. Sho.* 157.

If the policy be in the name of a stranger, yet he shall have the action, tho' it be the money of the *cestui que trust*; for it is paid in his name. *R. Sho.* 157.

Tho' by matter *ex post facto*, the payment be void. *R. Show.* 157.

[On a policy of assurance, tho' there is a clause that any dispute shall be referred to arbitrators. *Kill v. Hollister*, *P.* 19 G. 2. 1 *Wils.* 129.]

(a) *Vide ante*, held otherwise.

*On a policy of assurance if the plaintiff declare as for a *total* loss, and his evidence be only of a *partial* loss, yet he shall recover, for that is no variance; he may recover less than the damages laid in his declaration, tho' he cannot recover more. 2 Bur. 904.*

So, if *A.* receive money by authority from an administrator and pay it to him, and afterwards a will is found, and the administration repealed, an *assumpsit* lies against *A.* by the executor for money received to his use; for the authority being void, a debt arises to him who has the right. *Per Trevor, 1 Sal. 27.*

*But the administrator is also liable, and therefore it is better to bring the action against him if he be solvent, to avoid circuity of action. 1 *Morgan's Vade Mec. 82. Vide Ld. Raym. 1217.**

So, a woman shall have an *assumpsit* against a man who married her, having a former wife alive, for the profits of her estate, as for money received to her use. *R. 1 Sal. 28.*

But, if he who pays be *particeps criminis*, he shall not have an *assumpsit* for money received to his use; as, if *A.* bound in a bond upon an usurious contract pay part of the money, he shall not have an *assumpsit* for it. *R. 1 Sal. 22. Skin. 411.*

*So, if a man in possession of an office within the *stat. 5 & 6 Ed. 6. c. 16.* against the sale of offices, agrees, with another, to assign in consideration of a certain sum, to be paid on the admission of the promisser, the former cannot maintain *assumpsit*, nor any other action against the latter for the money. 1 *Morgan's Vade Mec. 82.**

If *A.* pay money to *B.* to bribe officers, which is paid accordingly, he shall not have an *assumpsit* against *B.* 1 *Sal. 22.*

[No *assumpsit* lies for a man who pays a forged bill of exchange drawn on him, to an indorsee who has acted *bonâ fide*. *Price v. Neale, M. 3 G. 3. 3 B. M. 1354.*]

*An *indebitatus assumpsit* lies on a judgment of a foreign court, without declaring upon, or proving the grounds and cause of action on which the judgment went, and if the judgment was obtained irregularly or unfairly the defendant must shew it. *Dougl. 1, 4.**

*So, upon an order to pay money made under the authority of an act of parliament. *Dougl. 407, 410.**

*So, if *A.* having obtained possession of goods entrusted to *B.* by *C.* to be sold at a fixed price, refuses either to return them to *B.* or to pay the fixed price, and *B.* being threatened with an action by *C.* pays him the price, for *A.* shall be presumed to have sold the goods. *Ibid. 137, 139.* But the plaintiff must give defendant notice of the nature of his demand. *Ibid.**

*So, *assumpsit* will lie against the assignees of a bankrupt, for a creditor's share under an order of the commissioners for a dividend. *Ibid. 407.**

*An *assumpsit* for money had and received only, is not a proper action to try a warranty. *Corwp. 818.**

*But

ACTION upon the Case upon *Assumpsit*.

*But *assumpsit* to try the warranty is good, though there was an express warranty, or the warranty was of something past or then existing, and tho' a count for money had and received be joined in the same declaration. *Dougl.* 18.*

**Assumpsit* for money had and received will not lie when the money has been paid on a contract which the other party contends to be still open. *Weston v. Downs, Dougl.* 23, 24.*

*But it lies where money has been paid on a contract which is rescinded. 1 *Term Rep.* 133.*

**Assumpsit* for money paid, laid out and expended, will not lie when the money has been paid against the express consent of the party for whose use it is supposed to have been paid.*

*As, where two parishes have been a long time united, and had a joint sexton, who was paid by both, one of them afterwards claimed a right of electing a separate sexton, of which they had given notice to the other, that other cannot maintain an action for money paid, &c. to the use of the first parish for their quota of the sexton's salary. 1 *Term Rep.* 20.*

(A. 2.) Upon a Bill of Exchange; and Promissory Note.

So, if a merchant direct a bill of exchange to another merchant payable to *A. or order*, and the other accepts it; by the law-merchant a promise is implied in the acceptor to pay it. *R.* 1 *Roll.* 6. l. 45. 2 *Cro.* 306.

And an *assumpsit* lies for every indorsee, to whom the bill is assigned.

So, every indorser, who assigns such bill, is liable to an *assumpsit* by any subsequent indorsee.

And, if the merchant, to whom a bill is directed, refuse it, the director is liable to every indorsee. *R.* 2 *Vent.* 308.

And if upon the merchant to whom a bill is directed refusing, a stranger accepts it for the honour of the director, he is liable. *Per Holt Tr.* 12 *W.* 3. *Gregory and Walcop.* Mar. 88. *Vide Lut.* 899. (*Reported Comyns's Reports* 76. 1 *Ld. Ray.* 575.)

And if a man, not a merchant, direct a bill of exchange, he is liable according to the usage among merchants. *R.* 2 *Vent.* 295. *R.* 2 *Vent.* 310.

If a merchant direct two bills to *A.* payable to *B.* for the same sum, (the one payable, if the other be not paid, as the usage is,) and *A.* accept the second, he is suable upon the first bill, with an averment, that he has not paid either the one or the other. *Dub. T.* 12 *W.* 3. *B. R. between Milner and Harrison.*

If the indorser pays the indorsee, the acceptor is afterwards liable to him. *R. Lut.* 888.

If a bill is payable to *A.* for the use of *B.* and *A.* indorses it, an *assumpsit* lies by the indorsee, tho' *A.* had paid it upon an extent at the suit of the king against *B.*; for *A.* was the visible owner. *R. Sho.* 4.

If a note was payable to *A. or order*, the order could not have an *assumpsit* but in the name of *A.*; for this was not of the nature

ture of a bill of exchange. *Cont. R. between Cromwell and Floyd. T. 9 W. 3. Rot. 500. C. B. Dub. in B. R. T. 12 W. 3. Rot.—between Butcher and Swift, R. acc. in B. R. between Clerk and Martin. 1 Sal. 129. R. acc. in B. R. between Buller and Crips, M. 2 Anna, Rot.*

So, a declaration upon a promissory note, as upon a bill of exchange of merchants, was not well. *R. 1 Sal. 24.*

But a promise by *A.* in consideration of a note of *D.* being delivered to him, was sufficient; for it was evidence of a debt, and shall be intended an absolute delivery. *R. 1 Sal. 25.*

But now by the *stat. 3 & 4 Ann. 9.* all notes made after the 1st of *May, 1705*, by any person, or by the servant or agent of any trade usually intrusted to sign notes for his master, whereby promise shall be to pay any sum to any other *or order*, shall be payable, assignable, and indorsible over as inland bills of exchange; and the person to whom the note is payable, or indorsed, or assigned, may maintain an action for the said money against him who, or whose servant or agent, signed it, or against any of the indorsors, as in case of inland bills of exchange.

Upon a note payable to *A. or bearer*, the law did not imply a promise to the bearer. *R. 3 Lev. 299. Agr. T. 12 W. 3. B. R. between Swift and Butcher.*

Yet, now by the *stat. 3 & 4 Ann. 9.* notes after 1 *May 1705*, given payable to any person *or bearer*, shall be construed to be due to such person, to whom the same are made payable; and the person, to whom they are made payable, may maintain his action, as he might in case of inland bills of exchange, against the person who, or whose servant or agent signed the same.

[On a joint and several promissory note from *A.* and *B.* plaintiff may bring action against both, or against either; if against both, must declare that they *conjunctim vel divisim* promise to pay.]

[If against one, must declare generally that he promised to pay. *Butler v. Malissy, H. 4 G. Str. 76.*]

[In action against one of the makers of a joint or several promissory note, the declaration must shew plaintiff's title to sue one of the makers. *Ovington v. Neale, M. 2 G. 2. Str. 819.*]

[Plaintiff may declare against the indorser, *secundum tenorem* of the indorsement. *Smallwood v. Vernon, M. 8 G. Str. 478.*]

[If a promissory note is delivered as an *escrow*, and plaintiff do not perform the service, he shall not recover. *Jefferies v. Austin, in C. B. M. 12 G. Str. 674.*]

[If *A.* gives promissory note, value received, payable to *B.* who indorses it and pays it away to *C.* and *B.* afterwards takes it up and pays *C.* the money for it, and after this *B.* gives the same note a second time to *C.* in payment, *A.* the drawer is still liable to *C.* *Gomezferra v. Berkley, H. 17 G. 2. Wilf. 46.*]

[Indorser who has owned his hand, and said the note should be paid when due, shall not afterwards set up a defence of forgery by similitude of hands, though by proof of actual forgery he may. *Cooper v. Le Blanc, T. 9 G. 2. Str. 1051.*]

[There

[There is no occasion to lay any request, in declaration on a promissory note; if there was, and the request was laid before the note was due, it would be cured if it was said—and often afterwards. *Frampton v. Coulson*, M. 17 G. 2. *Wilf.* 33.]

[If plaintiff declares that defendant *A.* made a promissory note for himself and his partner, and signed it, whereby he promised for himself and partner to pay, it is good within *stat. 3 & 4 Ann.* though he does not say he signed it for himself and partner. *Smith v. Jarvis*, T. 13 G. *Ld. Raym.* 1484.]

[One may declare on the statute on a note payable to plaintiff, and not to his order. *Moore v. Paine*, T. 9 G. 2. *B. R. H.* 288.]

So, if a bill of exchange by *A.* to *B.* or order, be indorsed only for part, the indorsee shall not have an *assumpsit* for this part, without shewing the residue satisfied. *R. 1 Sal.* 65.

Upon a bill of exchange the plaintiff must declare upon the custom, not upon an *indebitatus assumpsit*. *Per two J.* 1 *Vent.* 153. *Semb. Lut.* 1585, 1594. *Dan.* 27.

And, where the declaration was upon the custom, and likewise upon an *indebitatus assumpsit*, and intire damages given, the judgment was arrested. *Per cur.* 1 *Vent.* 153. *Vide 1 Sal.* 24.

And, the time and manner of acceptance must be alledged. *R. Lut.* 233.

[It is not necessary to aver that the acceptance of a bill of exchange was in writing. *Erskine v. Murray*, M. 2 G. 2. *Str.* 817. *Ld. Ray.* 1542.]

So, the custom ought not to be alledged to all persons, &c. *R. Lut.* 892. *b.*

Nor, that by the custom of England, &c. though it will only be surplusage. *R. Hard.* 486.

But a custom alledged at London, that any merchant, &c. is good. *R. Lut.* 233. 1585.

So, if the plaintiff alledge, that the defendant *fecit billam manu suâ subscriptam*, tho' he does not say *secundum usum mercatorum*, it is sufficient. *R. Lut.* 279.

Tho' he do not alledge, that value was received. *Lut.* 889. *a.*

So, if the plaintiff alledge payment for the honor of the drawer, without saying to whom, it will be good, after verdict. *R. Lut.* 899.

Debt will not lie against an acceptor. *R. Hard.* 487. 1 *Sal.* 23. *Mod. Ca.* 129. *Vide Dett.* (B.)

But, against the drawer himself, debt will lie, or an *indebitatus assumpsit*. 1 *Sal.* 23.

[The acceptor shall not be admitted to give evidence that the bill is forged. *Jenys v. Fowler*. H. 6 G. 2. *Str.* 946.]

How bills of exchange must be made, accepted, and protested, *Vide in Merchant* (F. 4, &c.)

(A. 3.) Upon an Express Promise.

So an *assumpsit* lies, when a man by express words assumes to do a certain thing. (A. 3.) The words must be certain.

And the words must be certain; and therefore, if a declaration omit the words, (*assumpsit solvere*,) it is bad. *Semb. 1 Sid. 306.* But it is a doubt, whether it be not only form. *Ray. 123.*

So, if a promise be, to pay so much upon a special consideration; after it is performed, an *indebitatus assumpsit* lies. *R. F. g. 303.*

[Although plaintiff pays money above 10*l.* lost at play by defendant, at his request. *Alcinbrook v. Hall, P. 6 G. 3. 2 Willf. 309.*]

[On a note; *Received of plaintiff 19*l.* on behalf of a third person, for which I promise to be accountable.* *Harris v. Huntbach, T. 30 & 31 G. 2. 1 B. M. 373.*]

[On a note; *It is my request that you pay A. on account of B. for the workmen's use, 15*l.** *Ibid.*]

*So, if a rector give *A. B.* a title to the bishop, and thereby appoint him curate of his church, promising to allow him a salary, and to continue him in the office of curate till otherwise provided of some ecclesiastical preferment, unless lawfully removed for any fault, he cannot afterwards remove him without cause; and if the salary be in arrear, *A. B.* may maintain *assumpsit* upon the title. *Cowp. 437.**

*So, where a lessor made an agreement with the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the good will already paid by such assignee," this operates as a surrender of the lease; the assignee cannot distrain, for no rent can be due from the lessor to him, for as soon as the lessor should have paid the original rent mentioned in the lease to the assignee, he had a right to recover it back as original landlord, and the sum to be paid annually is to be considered as a sum in gross for which *assumpsit* will lie, and not as rent. *1 Term. Rep. 441.**

*Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust, and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it; an *assumpsit* lies on such express promise. *Foster v. Allanson, 2 Term Rep. 479.**

*So, though there was a covenant between the parties to account. *Moravia v. Levy. Ib. 483. in the notes.**

If, a promise be to do a thing not in his power, yet an *assumpsit* lies: as, to assign the lease of a stranger; for he may purchase it. *R. 4 Lev. 2.*

(A. 4.)
But certainty to a common intent is sufficient.

Yet, it is sufficient, though there be not an absolute certainty; as, a promise to pay *tantum quantum mereret*, with an averment, *quod meruit tantum*. R. Cro. El. 149. 2 Cro. 370. R. Cro. Car. 77.

So, a promise to pay so much, tho' he does not say, *to whom* the payment shall be made. R. Cro. El. 149, 848. R. Cro. Car. 77. 1 Rol. 30. l. 30.

Or, *at what time*; for it shall be in a convenient time.

So, to pay *modo sequenti*, viz. *to give a bond*, &c. R. Cro. El. 848.

To pay according to the rate of so much. R. Tel. 134.

So, a promise, *quod toleraret, vel mitteret prosequi*, is good. 1 Rol. 24. l. 50. R. 1 Sid. 446. 1 Mod. 43.

So, if the declaration alledge, *quod cum defendens assumpsit*, it is good, tho' there is no direct affirmation. R. Hard. 3.

So, an *assumpsit* to give a bond for 40*l.* without saying *in what penalty*, is good; for it shall be intended, double the sum. R. 1 Lev. 83.

An *assumpsit* to purchase land at the best rate he can, shall be intended, if the owner is willing to sell it. Dub. 1 Lev. 3.

(A. 5.)
And there shall be a reasonable construction.

And the words shall have a reasonable construction; as, if a man promise payment, without saying, *to whom*, it shall be intended, to him, from whom the consideration comes. R. Cro. El. 149, 848. Popb. 182. Noy 83. Cro. Car. 77. R. 1 Rol. 30. l. 30.

If he promise *quod parceret illum*, it shall be intended, that he would forbear the debt, or to sue him. 1 Rol. 15. l. 15.

If he promise payment, *according to the rate of 40*s.* per ton*, it shall be intended that he will pay for the odd pounds according to the same rate. R. Tel. 134.

If he promise payment upon *Easter-day*, if A. do not pay the same day, A. has all the day for payment, and therefore, it shall be intended of a payment afterwards upon request. R. 1 Rol. 15. l. 45.

A promise, *that a feme covert shall perform her agreement*, shall be intended; of such agreement as she may have made, tho' she cannot by law make an agreement. 1 Rol. 19. l. 5.

A promise to pay *the same 100*l.** shall be intended, the same in quality, not in *specie*. R. Tel. 50. 1 Rol. 25. l. 10.

To pay for cattle sold to B. *reserving the payment at a future day*, shall be extended to a sale, where part is paid in *presenti*, and part is to be paid at a future day. 1 Rol. 20. l. 40.

To pay 100*l.* *if he marries, and has a son within a year tunc proxime sequenti*, shall be intended, within a year after the marriage, and not after the promise. R. 1 Vent. 262.

A promise, in consideration, *that the plaintiff at his request would procure a note*, &c. shall not be intended of any other request, than that at the time of the promise. R. 2 Vent. 71, 75.

Otherwise, if the words had been, *when he shall be requested*. 2 Vent. 71, 75.

If a man promise to pay for *wedding apparel*, it shall be understood, of apparel used for two or three days during the solemnity of the marriage, according to the quality of the persons. *R. Cro. Car. 53.*

If, in an *assumpsit* he alledge *that he agreed or paid*, &c. it shall be intended, with or to the defendant. *R. Cro. El. 229.*

So, if he alledge, in consideration of a *submission to an award*, it shall be intended of an absolute submission. *R. Cro. El. 460.*

In consideration, *that he would deliver up a bond*, shall be intended, of such a delivery as that it may be cancelled. *R. Sal. 457.*

In consideration, *quod venderet et superinde deliberaret*; if he deliver before the action, tho' not immediately upon the sale, it is sufficient. *R. Mo. 702.*

If a promise be *transferre negotiationem suam, Ang. trade*, tho' the word is uncertain, yet it will be well. *R. Al. 67.*

If it be, in consideration of the delivery of *20s. old money*, to render so much in new; for a delivery in consideration of having so much in value amounts to a sale. *R. 1 Sal. 25.*

In consideration *that he would accept him for his debtor*, he promised to pay *20l. due from A.* shall be construed as a mutual promise to discharge *A.* *R. 1 Sal. 29.*

If he promise to pay *quantum rationabiliter valeret*, for *valebant*, it will be well. *R. 3 Mod. 190.*

If, in an *assumpsit* by *A. and B. nuper guardian ecclesie*, it be declared, that the defendant, in consideration, *that the bishop would absolve his mother, excommunicated for non-payment of a rate to the churchwardens*, promised to pay the rate; it shall be intended, that the plaintiffs were churchwardens at the time, and that the excommunication was upon their prosecution. *R. 2 Lev. 119.*

If the receiver of *B.'s rents* promise to pay *within a month*, having authority from *B. to pay out of the Michaelmas rent*, it shall be intended, that he had received the rent, when he assumed to pay. *R. 2 Lev. 20. Vide 1 Vent. 152. Ray. 211.*

If *A.* promise in 1659, to pay *50l. if Charles Stewart be king within twelve months*; for it shall be intended, if he come into possession. *R. 1 Lev. 33.*

If he promise, in consideration of the delivery of *ducentas centenas lupulor'*, *Anglice 200lb. weight*; for it shall not be intended *20,000.* *R. Crr. Car. 33.*

(B.) Consideration.

(B. 1.) What will be a good Consideration.

THE consideration, upon which an *assumpsit* shall be founded, must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. (B. 1.)
Forbearance of a
suit.

And therefore, a promise in consideration of the forbearance of a suit, is good; for that is for the benefit of the defendant, tho'

tho' the action is not discharged; for forbearance for a reasonable time is sufficient. *Semb. per Hob.* 216. *Cro. El.* 387.

But it shall be intended, a total forbearance. *R.* 2 *Cro.* 397. *Per two J.* 2 *Cro.* 683. *R.* 1 *Rol.* 27. l. 5.

*But a promise by the defendant himself to pay debt and costs awarded by a judgment, is no ground on which to raise an *assumpsit*, for it is turning a judgment-debt into a simple contract-debt. Otherwise, if such undertaking had been by a *third* person in consequence of such forbearance. *Cowp.* 128.*

So, in consideration of forbearance for a convenient, or reasonable time; and the judge of *nisi prius* shall be judge of that. *R. Mo.* 854. 1 *Rol.* 26. l. 50. *R.* 3 *Bul.* 207. *R.* 1 *Sid.* 45. **Qu.* whether he may not leave it to the jury on the circumstances.*

Otherwise, *per breve* or *paululum tempus*; for then he may sue immediately. *Cont.* 1 *Leo.* 61. 1 *Rol.* 27. l. 10. *R. acc. sepe* 1 *Rol.* 23. l. 10. But *Cro. Car.* 241. *cont. R. Acc.* 1 *Sid.* 45.

Or, *pro aliquo tempore.* *R. Cro. Car.* 438. 1 *Rol.* 23. l. 20. *R.* 1 *Sid.* 45.

So, in consideration of the forbearance of a suit in *chancery.* *Ray.* 372. *Vide Cro. El.* 768. 2 *Cro.* 47.

In consideration of not suing an attachment. 1 *Rol.* 26. l. 40. *Cro. El.* 848.

Of not executing a *capias utlagatum.* *Per three J. Yel.* 19.

So, in consideration of the forbearance of a suit against an executor or administrator, for a debt of the testator. *R.* 9 *Co.* 94. *a. R. Cro. El.* 643, 4. *R.* 1 *Rol.* 26. l. 50. *R. Mo.* 854. *R.* 2 *Cro.* 273. *R.* 1 *Vent.* 120.

Tho' it be a debt upon a simple contract. *R.* 1 *Rol.* 28. l. 30. 2 *Cro.* 47. *Yel.* 55.

Or, a debt recoverable only in *chancery*, as, payment by a surety for the testator. *R.* 1 *Sid.* 89.

Or, though it be for a legacy. *R.* 1 *Vent.* 120. 2 *Lev.* 3.

So, in consideration of the forbearance of a suit against him, upon a contract whilst an infant. *Dy.* 272. *a. in marg. Vide post.* (F. 8.)

[Promise in consideration of forbearance, not good where there was originally no cause of action; as, if a note is given by a *feme-covert.* *Loyd v. Lee*, E. 4 G. Str. 94.]

In consideration, that he accounted with the executor at his request. *R.* 1 *Vent.* 268.

But, if there be no debt, or assets, it shall be given in evidence. *Cont.* 1 *Rol.* 24. l. 45. *Per three J. cont. and 2 acc. Mo.* 419. *Yel.* 11. *Semb. acc. Mo.* 854. *R. acc.* 9 *Co.* 94. *Barnes. R.* 2 *cont. Lev.* 3. *Acc.* 3 *Leo.* 67. *R. cont.* 1 *Vent.* 120.

So, in consideration of the forbearance of a suit against an heir upon a bond of his ancestor, if he was bound and had assets.

And the lien ought to appear, not only in evidence, but also in the declaration. *R. cont.* 1656, for it is aided after verdict. *Ray.* 128. *in marg. Dub.* 17 *Car.* 2. and *R.* that the omission is not

not aided after verdict. 22 Car. 2. Ray. 128. and in marg.
R. 2 Sand. 136. 1 Vent. 159.

So, in consideration of forbearance by the assignee of a bond, if he has a letter of attorney to sue and release. R. 1 Rol. 20. l. 15.

Of forbearance of him and his son, to pay both the debts.
R. 1 Sid. 38. R. Ray. 32.

In consideration of forbearing him, being the receiver of *A.* to pay an annuity due by *A.* if he continued receiver; without an averment of rent in his hands. R. 1 Vent. 152. Ray. 211. Vide 2 Lev. 20.

Or, being indebted in so much to *A.* who had assigned the plaintiff to receive his debt of the defendant. R. 1 Vent. 154.

So, in consideration of the forbearance of a suit against a stranger; for that is a prejudice to the plaintiff. D. 9 Co. 94. a. R. Rol. 27. l. 5, 30.

Or, of the forbearance of his debt, generally; for then he ought to forbear all the world. R. 1 Rol. 22. l. 35. Semb. cont. Yel. 184. R. acc. 1 Sid. 242.

So, in consideration, that the plaintiff, to whom a debt was assigned, will forbear a stranger. R. Hard. 74.

So, in consideration of surceasing of his suit; for that is a benefit to the defendant, and a prejudice to the plaintiff, tho' the action is not discharged. R. Hob. 216. 1 Rol. 19. l. 30. (B. 2.) Surceasing of a suit.

So, to surcease all suits in *chancery*; though he may proceed for the same matter at law. R. 1 Rol. 19. l. 20. 2 Bul. 41.

So, to surcease his and his son's complaint against the defendant's son. Per three J. Yel. 1.

So, to discharge a man arrested for a little while, tho' he may be retaken immediately; for the present respite is a benefit. Per Popb. 1 Rol. 27. l. 15.

So, in consideration of a submission to an award, a promise to surcease a suit is good; tho' the submission may be revoked. R. 1 Rol. 27. l. 25.

So, in consideration of the discharge of a stranger arrested for debt. R. Pal. 394.

In consideration to pay 60*l.* in discharge of a bond, R. 2 Cro. 194.

So, in consideration of the discharge of a debt.

Tho' the debt was due to a stranger; for the plaintiff has a prejudice by the loss of his debt. (B. 3.) Discharge of a debt or security.

So, in consideration of the delivery of a statute for the security of a debt due to the plaintiff, though it be not assigned to the defendant, and so no benefit to him; for it is a damage to the plaintiff. R. 1 Rol. 20. l. 30. Hob. 4, 5.

Or, of the delivery of a bond. R. 1 Sid. 31.

[If plaintiff declares, that on payment of 22*l.* defendant promised to re-deliver a bond he had delivered him; and proves that he

he pledged the bond for 22*l.* which he had tendered, it is sufficient. *Alcoran v. Westbrook*, M. 19 G. 2. *Wilson* 115.]

Or, of goods pledged by a stranger. R. 1 *Rol.* 19. *l.* 35, 45. R. 2 *Cro.* 257.

Or, of a bill of exchange in his custody. R. 1 *Rol.* 22. *l.* 10.

Or, of the assignment of a bond by the principal, to his bail or surety. R. 1 *Rol.* 17. *l.* 25. *Cont. Cro. El.* 538.

Or, of the assignment of a judgment, with a letter of attorney. R. 1 *Sid.* 213.

So, in consideration of a conveyance to *A.* as he should appoint, of all the lands called *B.* though it be said, that the plaintiff *nihil habuit in tenementis*. R. 2 *Lev.* 33.

(B. 4.)
Proof of a
debt.

So, in consideration of the proof of a debt, for it is a charge to the plaintiff, as, if a woman in consideration of the proof of a debt due from her husband, promise payment. R. 1 *Sid.* 57. *Ray.* 32.

Or, an heir promise the debt of his ancestor.

Or, an executor promise, upon proof of the delivery of the goods to his testator, to pay for them. R. 1 *Leo.* 94.

And the proof of the debt may be in an action upon the case upon *assumpsit*.

But, if the parties agree to a particular manner of trial, it shall be determined in such manner. R. 3 *Lev.* 241.

So, in consideration that the plaintiff would shew a specialty by which the intestate was bound; though before administration granted. R. 1 *Sid.* 369.

Or, if the defendant does not prove payment within a little time. R. 1 *Rol.* 23. *l.* 40.

Or, in consideration, that the plaintiff would make an *affidavit* of his debt before a master in *chancery*; though he had no authority to administer it. R. *Ray.* 153.

Or, would shew a deed, by which rent was due. R. *Cro. El.* 67.

So, if *A.* be bound for an infant, and pay the money, and the infant at full age promise re-payment, an *assumpsit* lies. R. 3 *Leo.* 164. 4 *Leo.* 5. *Dy.* 272. *a. in marg.*

So, if an infant give a bond, and at his full age promise payment; for in conscience he ought to pay it. *Adm. Cro. El.* 126, 7. *Dy.* 272. *a. in marg. Vide post.* (F. 8.)

(B. 5.)
Endeavour
to do an act.

So, in consideration of his labour for him. 1 *Vent.* 44.

Of his *multum, et gratissimum servitium*. *Semb.* 1 *Vent.* 27. *But not *multa et gratissima servitia*, without alledging a particular instance; and the verdict being general, and entire damages given, the plaintiff had not judgment.*

That he would procure the enjoyment of a house; with an averment that he had procured it. R. *Yel.* 11.

Or, would procure a note from the debtor of the plaintiff requiring the defendant to pay him. R. 2 *Vent.* 71, 74.

Or,

Or, would endeavour a marriage between *A.* and *B.* with an averment that he had endeavoured *omnibus modis quibus poterat*, and the marriage took effect. *Ray* 400.

So, in consideration of soliciting a cause in *Chancery*; for that is lawful if it be not for maintenance. *R. Cro. El.* 760. *R. Hob.* 67. *1 Rol.* 17. *l.* 15. *R. Cro. Car.* 159. *Vide Attorney*, (*B.* 18.)

Tho' done by an attorney. *R. 1 Rol.* 17. *l.* 35. *Cro. Car.* 160.

So, in consideration of his permission to do such an act; as, (*B.* 6.) to permit a wife to take out administration *durante minori etate* of her son; for it does not belong to her. *R. 1 Rol.* 21. *l.* 30.

To permit his prisoner to remain at the defendant's house all night. *R. 1 Sid.* 132.

In consideration, that he shall be absolved from excommunication for non-payment of a rate for the repair of the church; for it shall not be intended, that he could be absolved without the churchwarden's assent. *R. 1 Vent.* 297.

So, in consideration, that a *feme-covert* will permit her son to be servant to him. *R. 1 Rol.* 20. *l.* 5.

Or, will not hinder his purchase of her husband. *R. 1 Rol.* 21. *l.* 50.

Or will consent to the marriage of her daughter. *Per three J.* *Mo.* 857. *Hob.* 10. *1 Rol.* 19. *l.* 50.

In consideration, that he will procure his master to permit him to have part of his shop. *R. Godb.* 216.

But, an *assumpsit* does not lie upon a promise, to pay a bond, if *A.* at the request of the plaintiff, will permit him to take out administration, unless he says, that *A.* did permit him at the request of the plaintiff, or by his procurement. *R. Jon.* 441.

So, in consideration of a mutual promise; as, in consideration of a reciprocal promise of marriage. (*B.* 7.) *R. 1 Rol.* 22. *l.* 5. *R. 1 Mutual Sid.* 180. *Per three J.* *Vaugh. cont. Carth.* 233. *Mod. Ca.* promise. 155. *Vide post.* (*F.* 4.)

So, a promise to pay to *A.* in consideration of a promise to pay so much to *B.* *R. Mo.* 574. *Dub.* 1 *Rol.* 29. *l.* 10. *R. Cro. El.* 543. *4 Leo.* 3.

So, in consideration of marriage; as, upon a communication of a marriage, a cousin of the husband promises the wife to give her 100*l.* if the husband's father does not assure such land. (*B.* 8.) *R. Cro. El.* 63. *4.* *By 29 *Car.* 2. *c.* 3. *f.* 4. the promise must be in writing.*

So in consideration of the performance of an act, to which he was compellable; as, if the plaintiff will discharge a debt, for which he and the defendant are sureties, he will repay the moiety. (*B.* 9.) *R. 1 Rol.* 20. *l.* 50. *Voluntary performance of an act, which he ought to do.*

If he will pay the single sum due upon a bond, the defendant will cancel the bond. *R. 1 Rol.* 23. *l.* 5, 27. *l.* 51. *R. Cro. Car.* 8. *Hutt.* 76. *R. Cro. El.* 194.

Or,

ACTION upon the Case upon *Assumpsit*.

Or, surcease his suit upon it. *R. 1 Rol. 21. l. 15.*

In consideration of 4*l.* paid, to release a judgment for 7*l.* and enter satisfaction upon the record. *R. Mo. 412. 1 Rol. 28. l. 5. Cro. El. 429.*

In consideration of payment by the bail to discharge him, and assign the obligation of the principal. *R.* but the judgment was reversed. *1 Rol. 28. l. 15. Mo. 719. Cro. El. 538.*

In consideration of payment to an executor of 150*l.* in satisfaction of 205*l.* due to the testator; for now the executor shall sue in the *debet*. *R. Yel. 10, 11.*

In consideration of paying in the morning of the 9th of Oct. money payable the same day upon a bond, to give 5*l.* for it was not payable till sunset. *Per Hob. Cro. Car. 8. Hutt. 76.*

In consideration of payment without suit of money due. *1 Vent. 258.*

In consideration of the payment of a debt barred by the statute of limitations. *1 Vent. 258.*

In consideration, that the vicar of such a parish will preach to and instruct the inhabitants. *R. 1 Sid. 409.*

In consideration of the delivery of goods sold to his son, to pay, if his son do not pay. *R. Cro. El. 700.*

So, in consideration of a trust reposed in him; as, if he delivered an hog to him to be masted, he promises to re-deliver it. *R. Cro. El. 137.*

In consideration, that two merchants deliver notes into his custody, he promises not to deliver them to either of them, till all matters are agreed between them. *R. Cro. El. 138.*

(B. 10.)
Any other
act by
which the
defendant
has benefit.

So, in consideration of any other act, by which the defendant has benefit; as, in consideration of the moiety of a reckoning in a tavern, where he was invited by an executor. *R. 1 Rol. 24. l. 5.*

In consideration, that he had hired his house, to dress his victuals for two pence a joint; for otherwise, his house would not have been hired. *R. 1 Rol. 26. l. 5.*

In consideration, that he deliver to him goods, in which the plaintiff had only a special property; for the defendant has a benefit by the present possession. *R. Cro. El. 218. Vide Yel. 4, 50, 128.*

That he will pay an annuity to his younger brother, if his father does not charge his estate for it. *R. Cro. El. 163.*

In consideration, that he had paid to him 10*l.* he would pay so much into court, and appear; for he has the benefit of the money in the mean time. *R. 2 Vent. 45.*

(B. 11.)
Or the
plaintiff
has labour
or detri-
ment.

So, in consideration of any other act, whereby the plaintiff has labour or detriment; as in consideration, that the plaintiff will procure an order for payment to him from a person, to whom the defendant confesses himself indebted. *R. 2 Vent. 71, 74.*

In consideration that the plaintiff will permit him to receive of *A.* money, which *A.* owes the plaintiff, he promises a bill

bill of exchange for so much; tho' *A.* afterwards becomes insolvent, and does not pay, the promise is good; for the plaintiff perhaps would not have delayed *A.* if he had not relied upon the defendant's promise. *Per Wadham Windham, at Norfolk Assis.* 1663. *between Edgar and Chetham.*

In consideration, that the plaintiff will serve his friend, he will give so much *per week.* *Dy. 272. a. in marg.*

That the plaintiff will seal the counter-part of a lease to him by *B.* in which there was a covenant to repair, the defendant promises to do the repairs; for the plaintiff was prejudiced by the covenant. *R. Dy. 272. a. in marg.*

In consideration, that the plaintiff would act for him, as a commissioner to examine witnesses. *R. Sho. 342.*

[A ship is put into a shipwright's dock to be repaired, the owner is to give him 5*l.* for the use of the dock, the ship is burnt without shipwright's default, he may recover for work and labour done, and materials provided. *Menetone v. Ashawes, M. 5 G. 3. 3 B. M. 1592.*]

*In mercantile transactions, the want of consideration is no bar to an *assumpsit.* 3 *Burr.* 1666.*

(B. 12.) Consideration executed in Part.

So, an *assumpsit* lies, though the consideration be executed in part; as, in consideration, that he had done a thing at my request. 1 *Rol.* 13. *l.* 35. 11. *l.* 40.

As, that he at my request had laboured for a pardon. *R. Hob.* 105. *Mo.* 866. 1 *Rol.* 11. *l.* 40, 45.

Or, became bail or surety. *Dy. 272. a. Cro. El.* 42. *R.* 2 *Cro.* 18. *Yel.* 40. *R.* 1 *Rol.* 11. *l.* 30, 35, 12. *l.* 18.

Or, deliver goods or money. *R. Cro. El.* 282. *Cont. Cro. El.* 885. *Vide Cro. Car.* 77. *R. acc.* 1 *Rol.* 11. *l.* 50. *Vide Cro. El.* 442, 741. *cont.*

Or, had married. *Dy. 272. b. Cro. El.* 59. *Cont. Dy.* 272. *b. in marg. Vide infra.*

Or, had provided maintenance. *R.* 1 *Rol.* 12. *l.* 15.

Or, had sold the next avoidance. *R. Cro. El.* 715.

Or, had solicited my cause. *R.* 1 *Rol.* 13. *l.* 5.

Or, had released a legacy. *Cro. Car.* 409. *Jou.* 365. 1 *Rol.* 13. *l.* 10.

Or, was bound for him during his infancy, that he would indemnify. *Dy. 272. a. in marg.*

So, if there was a discourse about giving 200*l.* to the plaintiff with his daughter in marriage, and afterwards the plaintiff married his daughter without his consent, and after the marriage the defendant promised 200*l.* *Dy. 272. b. in marg.* 2 *Leo.* 111. *Semb. Pal.* 560. *Vide supra et infra.*

So, if the consideration is continuing, tho' the act be executed; as, in consideration, that the lessee now in possession had paid his rent very well, to save him harmless; for prompt payment of the rent

rent is a continuing consideration when he remains in possession. *R. Cro. El.* 94. 1 *Leo.* 102.

In consideration, that he will make a lease according to a former agreement; for the agreement is not executed, till the lease made. *R. 1 Rol.* 12. *l.* 15.

A promise to pay, in consideration, that the plaintiff will deliver goods according to a former agreement with *B.* *R. 1 Rol.* 12. *l.* 25.

In consideration, that he had submitted to an award *ad tunc et ibidem promisit*; this couples the promise with the time of the submission. *R. Mo.* 367.

So in consideration of goods sold, or money lent at a day passed; for the debt continues. *R. 1 Rol.* 12. *l.* 30. *ad.* 40. 13. *l.* 45.

In consideration, that he had accounted, and was found in arrears. *R. 1 Rol.* 12. *l.* 45. *Mo.* 854.

That he had married his daughter. *R. Cro. El.* 59. *Adm.* 3 *Leo.* 366. *Vide supra et infra.*

That he had given counsel, *D.* to be adjudged. *Cro. El.* 59. 2 *Leo.* 111.

That he had purchased land, he promised to make an assurance, *R. Cro. El.* 138.

That he had prosecuted a suit for him; for after a verdict, it shall be intended to have been proved at his request; otherwise it would be maintenance. 3 *Leo.* 366. *But defendant might have demurred for not stating that it was at his request. 1 *Morg. Vad. Mec.* 107.*

That he had married his relation; though it was against his will. *Dub.* 1 *Leo.* 102. *R. 2 Leo.* 111. *Vide supra.*

That he had administered to his son, as a physician. *R. 2 Leo.* 111.

Tho' the son be dead at the time of the promise. *Dub. Pal.* 560.

That he had expended money for the funeral of his son in Spain. *Dub. Pal.* 560. *Vide post.* (F. 6.)

(B. 13.) Void in Part.

So, an *assumpsit* lies, tho' made upon two considerations, and one of them cannot be performed; for the damages shall be intended to be wholly given for the good consideration. *R. Cro. El.* 149. *D.* 1 *Sid.* 38.

As, in consideration of the assignment of a title to dower, and the not suing an attachment; tho' a title to dower cannot be assigned, but released to the terre-tenant. *R. Cro. El.* 847. 1 *Rol.* 30. *l.* 15.

In consideration of 10*l.* and a surrender; tho' a surrender cannot be made. *R. 1 Rol.* 30. *l.* 25.

In consideration of a permission to remove goods, and relinquish a foreign attachment; tho' it cannot be relinquished. *R. Yel.* 56.

So,

So, in consideration of two things; and one of them is insufficient; as, in consideration of forbearance of a debt due from the defendant, and his son; tho' as to the debt of the son, it is of no value. *R. 1 Sid. 38. Ray. 32.*

And the void consideration need not be proved. *R. 2 Cro. 127.*

But, if one of the considerations is found false by the jury, the action fails. *R. Cro. El. 848.*

Or, if one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing; as, in consideration of two shillings, and the escape of *R.* for the permitting the escape is unlawful. *R. Cro. El. 200. D. 1 Sid. 38. Vide 4 Leo. 3.*

In consideration of sixpence, and the execution of an *elegit* at the suit of *B.* *R. 2 Cro. 103.*

(B. 14.) Voidable and void.

So, an *assumpsit* lies, tho' the consideration is voidable; as, in consideration of money given, or of a promise by an infant; yet the infant is not bound by his gift or promise. *Cont. per Winch. 1 Rol. 19. l. 15. Per Hob. acc. 77. R. acc. 1 Sid. 41. R. 1 Vent. 51. 1 Mod. 25. Vide Covenant, (B. 1.)*

*If all the creditors of an insolvent consent to accept a composition for their demands, on an assignment of his effects by a deed of trust, to which they are all parties, and one of them before he executes obtain from the insolvent a promissory note for the residue of his demand as the condition of his executing the deed, the note is *void* in law as a fraud on the rest of the creditors; and a subsequent promise to pay it is without consideration, and will not maintain an action. *Cockett v. Bennett, 2 Term Rep. 763.**

(B. 15.) Considerations arising from another.

So, an *assumpsit* lies tho' the consideration arise in part from another; as, if a man promise a pigg of lead to *A.* and his executor give lead to make a pigg to *B.* who assumes to deliver it to *A.* an *assumpsit* lies by *A.* against him. *R. 1 Rol. 27. l. 40.*

So, if the assignee of an obligor promise payment to the obligee. *R. 1 Rol. 31. l. 5.*

If *A.* deliver money to *B.* to pay his debt to *C.* and *B.* promise, if he will come at another day, to pay it. *R. Dy. 272. a. in marg.*

*This last case is very ancient; at this day, a plaintiff would declare against *B.* for money had and received to his use. *1 Morg. Vad. Mec. 110.**

(C) When an *Assumpsit* lies, though there be another Remedy.

AN *assumpsit* lies, though there be another remedy; as debt. So, it lies upon an express promise to pay a debt upon specialty, upon a new consideration; as, in consideration of forbearance, &c. *Cro. Car.* 343. *R. Cro. El.* 240.

In consideration, that he will shew the deed, by which it appears to be due. *R. Cro. El.* 67.

[In consideration of money received, *A.* signs note to transfer stock to *B.* which he afterwards refuses to do, *B.* may bring *assumpsit*, or action for non-performance of the agreement: if the first, he can only recover the money paid, or less, if the price of stock is fallen before the transfer-day. *Dutch v. Warren*, *M.* 7 G. 1. cited in *Moses v. Macferlan*, *P.* 33 G. 2. 2 *B. M.* 1005.]

[*A.* makes notes to *B.* who indorses to *C.* who signs agreement that *B.* shall not be liable; yet sues him and recovers in court of conscience, because they thought they could not judge of this agreement: *B.* may elect to waive his demand on the indemnity, and bring *assumpsit* for money received to his use. *Ibid.*]

*Where goods are taken in execution and sold under a warrant of distress under a conviction; if the conviction be quashed, the owner may waive the tort, and bring an *assumpsit*, for money had and received. *Cowp.* 419. 1 *Term Rep.* 387.*

*So, where goods are taken in execution which are not the property of the persons against whom execution is taken out, the owner may waive the trespass, and bring his action for the amount of the money, for which the goods sold. *Id. Ibid.**

So, it lies for rent, upon an express promise; for it appears, that he intended to give him a double remedy. *Cont.* 1 *Rol.* 7. *l.* 25, 30. 8. *l.* 45. 2 *Cro.* 598. 668. *Cro. El.* 242. 859. *Cro. Car.* 343. *Hob.* 284. But *Semb. acc.* 1 *Rol.* 7. *l.* 35. 50. 8. *l.* 15, 25. 50. 22. *l.* 25. *Cro. El.* 118, 786. 2 *Cro.* 598. 1 *Brownl.* 14. *R. Cro. Car.* 414. *R.* 3 *Lev.* 150. *Jon.* 329. 364. *R. Hard.* 366. *R.* 1 *Leo.* 43

And this, after an assignment of the lease, and an acceptance of rent from the assignee 1 *Rol.* 9. *l.* 20.

And after verdict an express promise shall be intended. *Hard.* 366.

So, it lies for the value of a house hired, without an express promise. *Semb. cont.* 3 *Lev.* 150. Where upon a demurrer to an *assumpsit* for a certain sum for the enjoyment of land, it was ruled that an express promise shall be intended, and must be proved upon non *assumpsit*. But it was allowed, that an *assumpsit* lies for the value of shops hired, without an express promise. *Per Holt*, *C. J.* at *Hertford assises*, 13 *W.* 3. *R.* 3 *Med.* 73. *8kin.* 238. 242.

So,

So, it lies upon a promise made to an husband after the death of his wife, for the arrears of a rent-charge, which the wife had for her life, in consideration, that the rent was behind, tho' the rent-charge was created by deed. *R. 1 Leo. 293.*

But, an *assumpsit* does not lie generally, for rent reserved upon a lease. *R. Al. 29. R. Jan. 329. R. 1 Leo. 156. Cro. El. 242. Vide supra.*

(D) At what Time it lies.

IF a promise be to pay at several days, an *assumpsit* lies after the first day. *Vide Action, (F.)*

So, if a promise be to pay at *Michaelmas*, and *Lady-day annuatim*, &c. an *assumpsit* lies after each feast. *R. 2 Leo. 107.*

But, if the promise be to pay for an house 30s. *annuatim*, an *assumpsit* does not lie for 45s. for a year, and an half. *R. Lit. 61.*

By the *stat. 21 Jac. 16.* All actions of account and on the case, other than accounts concerning the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced within six years next after the cause of such actions, and not after. Provided, if in any such action judgment be reversed, or after verdict arrested, or the defendant be outlawed and reverse it, the plaintiff may commence a new action in a year after such reversal, or arrest of judgment. *Vide post, (H. 6, 7.)*

An action upon the case does not lie after six years, though it concerns merchants accounts; for this exception goes only to actions of account. *Per Morton, 2 Sand. 127. Per Twissd. 1 Mod. 71.*

A fortiori, it lies not upon an *in simul computasset*; for the exception does not relate to accounts stated, but only to accounts current. *R. per tot. cur. 2 Sand. 127. 1 Mod. 71.*

So, an *assumpsit* does not lie after six years upon a bill of exchange. *R. Carth. 3.*

*But if the plaintiff be a foreigner, and doth not come to *England* in 50 years, he has still 6 years, after his coming into *England*, to bring his action, and if he never come to *England* himself he has always a right of action while he lives abroad, and so have his executors or administrators after his death.*

*An infant may sue before he comes of age if he pleases; but if he does not, he has 6 years after he comes of age to bring his action. While any of the disabilities mentioned in the statute continue, the party may, but is not obliged to bring his action: the statute does not begin to run while any of those disabilities continue. *3 Will. 135.**

(E) By whom it shall be brought.

AN action upon *assumpsit* may be brought by him, to whom the promise was made, though the benefit accrues to another; as, if a man promise *A.* to give money to his daughter
when

when she marries, *A.* may have the action. *R. 1 Rol. 30. l. 44. 31. l. 15. Cont. per two J. Clinch. acc. Mo. 550. R. cont. Cro. El. 619. 652. Vide Yel. 1, 2.*

Or, to give a stranger 20*l.* *R. 1 Rol. 31. l. 25. 30. l. 50. R. Cro. El. 807. R. Hard. 321.*

*An action for money had and received, lies by the true owner of money or notes against a third person, into whose hands they have come *malá fide*; provided their identity can be traced or ascertained. *Cowp. 197. 200.**

*One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow, 2 Term Rep. 476.**

*So, where money is owing to two partners, and, after the death of one, it is paid to a third person, the surviving partner may maintain an action for money had and received to his own right, and not as survivor. *Ibid.**

*The same of money had and received after the testator's death, for which his executor may maintain this action. *Ibid.**

So, the executor or administrator of him, to whom the promise was made, may have the action, tho' the benefit accrues to another. *R. Al. 1. R. 1 Rol. 31. l. 20. Jon. 415.*

So, it may be brought by him likewise, to whom the benefit was: as, if a promise be to a *feme-covert*; the husband alone may have the action, and declare of a promise to himself. 27 *H. 8. 24. b. Tatam; cited Al. 1.*

Or, the husband and wife may join, at the election of the husband. *1 Rol. 32. l. 20.*

So, upon a promise to the father to give so much with his daughter in marriage, the daughter may have the action; for she is the meritorious cause. *Cont. 1 Rol. 30. l. 44. 31. l. 15. R. acc. ut. dicit. 1 Vent. 6. Agr. Al. 1. R. 1 Vent. 318. 332. 2 Jon. 102.*

Upon a promise to *B.* to pay 20*l.* to an infant at his full age, and to educate him in the mean time; the infant shall have the action. *R. 1 Rol. 31. l. 35.*

If money be given to *A.* to deliver to *B.* *B.* may have the action. *R. 1 Rol. 7. l. 10. 32. l. 30. Hard. 321.*

If a man promise my servant or attorney, to pay upon forbearance, to which I afterwards agree; I may have the action. *D. 1 Rol. 32. l. 10. Cont. Cro. El. 369.*

If an heir promise his father, who intended to cut down timber for the portion of his daughter, to pay so much for her portion if he will not cut it; the daughter shall have an *assumpsit* against the heir. *R. 2 Lev. 211. 1 Vent. 318. 332. 2 Jon. 102.*

If a promise be to *A.* upon payment of 50*l.* to re-assure land to *B.* the *assumpsit* may be by *B.* *R. Sav. 23, 4.*

If a promise be in consideration of 10*l.* given by *A.* and *B.* to return the beasts of *A.* and the beasts of *B.* they shall join, tho'

tho' their property was several; for the promise was to them jointly. *R. 1 Rol. 31. l. 40.*

But, where a promise is made to *A.* to deliver goods to *B.* they cannot both join. *R. Hard. 321.*

So the heir of him to whom the promise was made, shall not have an *assumpsit*. *R. Jon. 415.* *If an *assumpsit* be brought, it ought to be by the personal representative.*

(F) When an Assumpsit does not lie.

(F. 1.) Upon an Undertaking by Deed.

BUT an *assumpsit* does not lie, if the promise be by deed; for then covenant will lie. *R. 1 Rol. 11. l. 2. Vide in Covenant, (A. 1.)*

'Tho' it be at the end of a release. *R. 1 Rol. 11. l. 5. 2 Cro. 506. 1 Rol. 517. l. 43.*

*So, where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit*. *Toussaint v. Martinnant, 2 Term Rep. 100.**

So it does not lie upon a promise to pay a bond, without a new consideration; for he may have an action upon the specialty. *R. 2 Cro. 598. R. Mo. 340.*

[If plaintiff declare upon a special agreement, and also an *indebit' assumpsit*, if he does not prove the agreement, he cannot go on the *assumpsit*. *Weaver v. Burrows, M. 11 G. Str. 648.*]

*But if at the trial, it is found there is not sufficient proof of the agreement, he may avoid entering into proof of it, waive the agreement and proceed upon the *assumpsit*. *1 Morg. Vad. Mec. 115.**

[If a deputy covenant under hand and seal to account for fees, and afterwards new fees are created, *assumpsit* lies not, but covenant. *Bulstrode v. Gilburn, H. 9 G. 2. Str. 1027.*]

(F. 2.) Upon a casual Speaking.

So, it does not lie upon a speech in discourse; as, if a man in discourse say that he will give so much money with his daughter in marriage; for the agreement must be complete, upon which an *assumpsit* lies. *R. 1 Rol. 6. l. 40. Tel. 17. Noy 11. Dan. 26.*

(F. 3.) When it does not lie without a Memorandum in Writing.

By the *stat. 29 Car. 2, 3.* No action shall be brought to charge an executor, or administrator, or any special promise to answer damages out of his own estate, or to charge a defendant on a special promise for the debt, default, or miscarriage of another, or to charge any person upon any agreement in consideration

deration of marriage; or upon any contract, or sale of lands, or tenements, or any interest in or concerning them, or upon any agreement not to be performed within the space of one year; unless the agreement, or some memorandum, or note thereof be in writing, and signed by the party, or by any by him authorised.

But an action after the statute, was good upon a promise before tho' not in writing. *R. 2 Jon. 108. 1 Vent. 330. 2 Lev. 227. 2 Mod. 310.*

So, by the *stat. 29 Car. 2. 3.* No contract for sale of goods for the price of 10*l.* or upwards shall be good; except the buyer accept and actually receive part of the goods sold, or give earnest, or some note or memorandum in writing of the bargain being made, and signed by the parties, or their agents lawfully authorised.

And a letter written by a man is a sufficient memorandum, that he promises the thing contained in his letter. *R. 2 Vent. 361.*

Though he goes back from his letter, and afterwards agrees to it. *2 Vent. 361. *Vid. 3 Burr. 1663,* this subject fully discussed.*

The declaration need not make mention of the memorandum in writing; but it is sufficient to be proved upon the trial. *R. Sal. 519. Dan. 68. Vide 2 Jon. 158.*

Yet if the defendant plead an accord to accept payment by another, in satisfaction, he must shew that the promise of payment was in writing; otherwise it is no bar. *R. 2 Jon. 158. Ray. 451. Vide Accord, (C.)*

If a promise be to pay 320*l.* part her own debt, and part being the debt of her husband now dead, an *assumpsit* does not lie without a memorandum in writing; for the promise is entire, and the plaintiff shall recover the whole, or nothing. *R. 2 Vent. 224.*

Tho' it be found by a special verdict, that the part due from the husband was paid by the wife before the action brought. *2 Vent. 224.*

So, if there be a promise of marriage, there must be a memorandum in writing, as well as where the promise is for payment of money upon marriage; for it is within the words, a promise *in consideration of marriage*, and not out of the intent of the act. *R. 3 Lev. 65. Skin. 24*. Cont. Per B. R. 5 Mod. 411, in Harris v. Cage, et Ux. Sal. 24. Cont. Per King C. J. at Maidstone assizes, 1 G.*

[Parol promise of marriage at plaintiff's father's death, is not within statute of Frauds, and is good to maintain action for damages. *Cork v. Baker, H. 3 G. 1. Str. 34.*]

So, if an agreement be to assign a term for years, as well as where it is for an interest created *de novo*. *R. 1 Vent. 361.*

So, if there be a contract with *A.* for goods, and *B.* undertakes that *A.* shall pay, *B.* shall not be charged for the debt without writing. *Mod. Ca. 250. 1 Sal. 28.*

So,

So, if a man let out a horse to *A.* upon an undertaking by *B.* that *A.* shall re-deliver it, *B.* shall not be charged without writing; for he is charged for the default of *A.* *R. Mod. Ca. 250. 1 Sal. 27.*

[So, if *A.* brings suit against *B.* for a debt, and stays it on promise of *C.* to pay him the money due by *B.* *A.* cannot maintain *assumpsit*, without note in writing. *Fish v. Hutchinson, T. 32 & 33 G. 2. 2 Wils. 94.*]

Yet if *A.* be sued for appearing for *B.* without warrant, and he promise 10*l.* for forbearance of the suit, a memorandum is not necessary; for it is not a promise for the debt of *B.* but for his own debt. *R. 5 Mod. 205.*]

[Nor on a promise by a third person present in court, to pay plaintiff damages and costs in action for assault and battery, if he would withdraw his record. *Read v. Nash, T. 24 & 25 G. 2. 1 Wils. 305.*]

[So if a tenant owing rent assigns his goods for the benefit of his creditors, and landlord comes to distrain; on assignee's promise (*without writing*) to pay if landlord does not distrain, *assumpsit* lies. *Williams v. Leaper, P. 6 G. 3. 2 Wils. 308. 3 B. M. 1886.*]

So, an agreement to pay upon marriage shall be good, without a memorandum in writing, though the marriage was not within a year; for it was possible to be within the year, and therefore it is *casus omisus*. *R. in B. R. 9 W. 3. (cited Comyns's Reports 50.) Per Holt, Skin. 326. R. Skin. 353.*

So, if *B.* undertake the payment for goods delivered to *A.* there is no need of a writing; for *B.* is charged as the original debtor *Mod. Ca. 249, 250. 1 Sal. 28.*

So, if *A.* upon the sale of a horse promise, that if the buyer do not like him, upon returning of the horse to *B.* he will repay him, otherwise *A.* will; *A.* is the debtor. *R. 3 Lev. 363, 4.*

So, a promise, which by contingency may be within the year, or afterwards, need not be in writing: as, to pay upon the return of a ship. *R. 1 Sal. 280.*

So, if *A.* say, *my brother shall pay, &c.* *A.* is the original debtor. *R. F. g. 302.*

Or, *my brother shall not leave the kingdom, till he pay, &c.* *Semb. F. g. 202.*

[Parol promise to leave plaintiff a legacy, in consideration of service to be performed, is not within the statute. *Fenton v. Emblers, H. 2 G. 3. 2 B. M. 1278.*]

[Buying and selling at auctions is not within the statute of frauds. *Semb.* But certainly the auctioneer's setting down in writing the price, the buyer's name, &c. is sufficient. *Simon v. Motivos, T. 6 G. 3. 3 B. M. 1921.*]

*If a person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of Frauds. *Matson v. Wharam, 2 Term Rep. 80.**

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*And there is no distinction between a promise to pay for goods furnished to the use of another made *before* they are delivered, and one made after. *Ibid.* and *Cowp.* 227.*

*A promise in these words, "If you do not know him, you know me, and I will see you paid," not being in writing, is void by the statute of Frauds. *Ib.*

*So, "You must supply my mother-in-law with bread, and I will see you paid." *Id.* and *Cowp.* 227. (a.)

(F. 4.) Does not lie for an unlawful Thing.

So, an *assumpsit* does not lie upon a promise to do an unlawful thing; as, to give money for a presentation to a donative; for that is simony. *R. Cro. Car.* 337, 353, 361. *1 Rol.* 18. l. 5. *Vide post*, (F. 7.)

To return part of the portion, which she had upon her marriage; for that is fraudulent to the husband. *R. 1 Rol.* 21. l. 5. *Cro. El.* 774. But it seems, that the action will lie *ex rigore*, unless covin be pleaded, tho' the judgment was stayed for the male practice. *Mo.* 468. *Ow.* 63.

So, it does not lie upon a promise by an under-sheriff, to procure an inquisition to be found for goods upon an *elegit*; for it is contrary to his office, who ought to return an indifferent jury, and not procure any inquisition. *R. 2 Jon.* 24.

Nor, upon a promise to pay so much, for maintaining several suits for him, over and above his expences; for that will be maintenance. *1 Leo.* 179.

To permit his recovery of the plaintiff's goods in the possession of *A.* in a suit commenced by the defendant in the name of *B.* *R. 1 Leo.* 179.

To give 40s. if he did not beat *A.* out of such a close. *R. 2 Lev.* 174.

And if a promise be to do two things, and the one is unlawful, it is void for the whole. *R. 2 Jon.* 24. *Vide ante*, (B. 13.) *post*, (F. 7.)

But, a promise to pay interest is lawful, if it do not exceed the rate allowed by statute. *Cont. per two J.* *1 Rol.* 18. l. 15. *Dub.* l. 20. 30. *R. acc. Cro. Car.* 272. *Pal.* 291.

Or, to abstain from the exercise of his trade in such a town, upon consideration of so much money for his shop, or upon the marriage of his daughter, or the like consideration. *R. 2 Cro.* 596. *1 Rol.* 16. l. 50. 17. l. 5. *Vide in Trade*, (D. 3.)

To save harmless an under-sheriff, if he makes such a one his special bailiff. *R. 1 Rol.* 16. l. 30. *3 Leo.* 227.

So a mutual promise of marriage is lawful; for it is not an act merely spiritual. *R. 1 Rol.* 22. l. 5. *R. 1 Sid.* 180. *1 Lev.*

(a) But if the credit was given to the promiser originally, and the party furnishing the goods, cannot recover against the person for whose use they were furnished, then reasoning *à converso* the person promising must be liable; as if he say let such a one have goods and I will pay you, or look to me for the payment.

147. *R. per three J. Vaughan cont. Cart. 233. Adm. 1 Keb. 886. Vide ante, (B. 7.)*

So, a promise, in consideration of discharging him from his promise of marriage. *R. 1 Rol. 470. l. 5. Sti. 295. 303.*

So, the man may have an *assumpsit* upon a mutual promise of marriage, as well as the woman. *R. 1 Sal. 24. 5 Mod. 511. Carth. 467.*

But, in this action, a tender of himself to be married, must be averred. *Carth. 467, 8.*

(F. 5.) Does not lie without a Consideration.

An *assumpsit* does not lie without a consideration; as, if a man, without more, promise to build an house for another; for that is *nudum pactum*. *1 Rol. 9. l. 41.*

Or, in consideration of friendship, or affection, &c. *R. 2 Leo. 30.*

[Does not lie for 8*l.* betted against 14*l.* at a horse-race; for the 14*l.* could not be recovered, as contrary to 9 *Ann. c. 14. Blaxton v. Pye, P. 6 G. 3. 2 Wilf 309.*]

[But it is not necessary in the declaration to shew the consideration, if it is necessarily implied: thus, in action for a *port-duty*, it need set out none; for making the port is a consideration. *Mayor of Yarmouth v. Eaton, T. 3 G. 3. 3 B. M. 1402.*]

(F. 6.) Or, if the Consideration be executed.

So it does not lie, if the consideration be totally executed; as, *Vide ante*, in consideration that the plaintiff had bailed in time past the servant of the defendant. *R. Dy. 272. 1 Rol. 11. l. 25. (B. 12.)*

Or, expended money about his affairs, without saying, *at his request*. *R. 1 Rol. 11. l. 20.*

[Or for work and labour done by plaintiff for defendant, unless it be laid to be done at his request. *Hayes v. Warren, P. 5 G. 2 Str. 933.*] (a)

Or, expended money for the defence of his term, now expired. *R. Mo. 220.*

Or, had lent money, (if it be repaid.) *R. Mo. 643. Cro. El. 885. R. Cro. El. 442.*

Or, had paid a debt at the day when due. *R. Cro. El. 193, 4.*

Or, disburse money for his use, without saying, *at his request*. *R. 3 Lev. 366.*

So, if a consideration be alledged to be executory, and the jury upon *non-assumpsit* find it executed. *R. 3 Leo. 98.*

(a) Mr. Justice *Wilmot* says, 3 *Burr. 1671*. Many of the old cases, speaking of contracts without consideration or on a past consideration, are strange and absurd; so also are some of the modern ones, particularly that of *Hayes* against *Warren*; so that it would seem in his opinion, and it appeared to be that of the court, that the bare circumstance of the consideration being *past*, is no objection to its supporting an *assumpsit*.

(F. 7.) Or be unlawful.

So, if the consideration be unlawful; as, in consideration that an under-sheriff shall have so much for the execution of process; for it is the duty of his office. *R. 1 Rol. 16. l. 15.*

Tho' it be only his due fees, if it be not so expressed, and if they be offered by a stranger. *R. 2 Cro. 103. 1 Rol. 16. l. 20.*

Otherwise, if offered by the party, who sues the process. *R. Mo. 468. Cro. El. 654. 1 Rol. 26. l. 25.*

So, a promise to indemnify an under-sheriff, if he makes execution upon such goods, is unlawful; for he ought to take notice of the goods of the party at his peril. *Per two J. 1 Rol. 26. l. 16. R. cont. 2 Cro. 652. *Qu. whether it be not every day's practice to indemnify the sheriff in such cases, and whether it be not lawful.**

So, to indemnify an officer, who delivered him goods attached, before judgment. *R. Cro. El. 230. 3 Leo. 236.*

[So, to pay plaintiff (a bailiff) six guineas, in consideration that he will accept defendant and another as bail for a prisoner. *Statesbury v. Smith, H. 33 G. 2. 2 B. M. 924.*]

So, in consideration that an attorney will enter satisfaction upon a judgment in a cause, in which he was attorney; for after judgment, his warrant is determined, and he cannot do it without the licence of his master. *R. 1 Rol. 16. l. 10.*

In consideration that he will not give his testimony in such a suit. *1 Leo. 180.*

That he will procure him to be presented to such a benefice; for it is simony. *R. Jon. 341. Vide ante, (F. 4.)*

[So, to pay plaintiff 2*l. per cent.* to procure a purchaser of defendant's place in the customs is bad, and within *stat. 5 & 6 Ed. 6. c. 16. Stackpole v. Earle, H. 1 G. 3. 2 Wilf. 133.*]

That he will discharge him from a debt due to his master. *R. 2 Lev. 161.*

But a promise to a sheriff to pay the debt, if he will restore the goods taken in execution, is good; for it is no more than a sale of the goods. *R. 1 Sal. 28.*

Or, to save him harmless, if he permits the prisoner to stay at his house until such a day. *R. 2 Lev. 17.*

And if a promise be in consideration of two things, and one of them is unlawful, it is void for the whole. *R. 2 Cro. 103. Vide ante, (B. 13.—F. 4.)*

(F. 8.) Or, not beneficial to the Defendant, nor detrimental to the Plaintiff.

[A stranger to the consideration can maintain no action. *Crow v. Rogers, Tr. 10 G. Str. 592.*]

So, if the consideration be not beneficial for the defendant, nor gives any trouble or detriment to the plaintiff; as in consideration,

tion, that he is administrator, and has assets; for he would be charged *de bonis propriis*, without any advantage to himself. *R. 1 Rol. 24. l. 30.*

Or, in consideration of forbearance, when he was not chargeable; as if an executor has not assets. *R. 2 Mo. 702, 3.*

Or, by an heir who has no assets. *R. 1 Rol. 28. l. 35.*

So, if an heir promise, in consideration of the forbearance of a suit in *chancery*, to which he was not liable. *R. Cro. El. 206.*

So, if a woman upon the same consideration, promise payment of a debt of her husband's, tho' she has goods in her hands; for they may be *paraphernalia*. *R. 1 Rol. 28. l. 40.*

Or, a debt due to a surety for her husband. *R. 1 Rol. 25. l. 20.*

Or, a debt due from her son during his infancy. *1 Rol. 18. l. 40.*

Or, an executor promise upon forbearance of a debt contracted by his testator, when he was an infant. *R. Cro. El. 126. 1 Leo. 114.*

So, if an infant at full age, in consideration of forbearance, promise payment of money borrowed by him in his infancy. *R. 1 Rol. 18. l. 50. Cont. Cro. El. 127. 1 Leo. 114. but Wray J. there acc. Vide ante, (B. 1.)*

So, if an infant promise, in consideration of forbearance of a suit against him upon a bond. *Cro. El. 700. by Fenner, but Clench cont. 1 Rol. 18. l. 50.*

*It seems now to be clear that a promise made after full age will bind him, for it has been lately settled, that, if the plaintiff reply to a plea of infancy, that the defendant, after he attained twenty-one, confirmed the promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *1 Term Rep. 648.**

So, if an husband, after the death of his wife, promise a debt due by the wife before coverture. *R. 2 Cro. 257. R. Yel. 184. 1 Bul. 44.*

So, if a man in consideration of forbearance, promise payment of a debt of an intestate, tho' he afterwards takes out administration; for he was not liable at the time of the promise. *R. Mo. 685. *Vide case of Rann et al, executors of Mary Hughes v. Hughes, B. R. Hil. 14 G. 3. 1 Morg. Vad. Mcc. 124.**

Or, promise payment to the assignee of a debt, if he has not a letter of attorney to sue, or release; for the property remains in the assignor. *R. 1 Rol. 20. l. 20.*

Or, promise payment to the assignor after an assignment to the queen; for the queen may sue. *R. Mo. 701. Cro. El. 653. 1 Rol. 26. l. 30.*

Or, promise payment to one, who has a note from a debtor to receive the money of the defendant; unless it appear, that the defendant was indebted to the debtor. *R. 1 Vent. 9. 1 Sid. 396. Vide 1 Rol. 29. l. 5.*

So,

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So, if a man promise payment to an assignee, in consideration that he will accept him for his debtor. *R. 1 Sand. 210.*

Or, promise payment of a debt due to *A.* to whom the plaintiff's wife was executrix; if it does not appear, that his wife is alive. *R. Yel. 84.*

Or, money, which he himself owes. *R. 1 Vent. 258.*

So, if a *feme* executrix make an account with *A.* for a debt of her husband's, and a balance being due to *A.* promise payment. *R. Het. 1.*

So, if a man promise, in consideration of relinquishing an *assumpsit*, which was void. *R. 1 Rol. 26. l. 10.*

Or, in consideration of a discharge, if an arrest was tortious. *R. Yel. 25, 6.*

In consideration, *quod quer. multa beneficia intulit* to the defendant, without saying, *what.* *R. 1 Sid. 413.*

So, if he promise, in consideration of a lease at will; for he may determine it at his pleasure. *R. 1 Rol. 23. l. 37.*

In consideration of a surrender of a lease at will; for the lessor might determine it, unless there was a doubt, whether it was a lease at will, or for years. *R. 1 Rol. 23. l. 25, 35. R. 1 Brownl. 6.*

So, if a woman promise, in consideration, that he will permit her to take out administration to her husband; for it belongs to her. *R. Mo. 685. 1 Leo. 240.*

So, if a man promise, in consideration, that goods are delivered to him to re-deliver them; for the bare custody is more a charge than a benefit. *R. cont. but, judgment reversed. Yel. 4. R. acc. Yel. 50. R. Yel. 128. Cont. 1 Sal. 26.*

If the consideration be void, the defendant may demur to the declaration. *1 Vent. 9.*

(G) How an *Assumpsit* may be discharged.

IF a man make a promise, he to whom it was made, before a breach may discharge it by *parol.* Per Hought. 2 Cro. (620.) Trefwaller and Keyne, R. Cro. Car. 384. *R. 2 Leo. 214. Per Twisd. 1 Sid. 177. Adm. 1 Sid. 293. Adm. 2 Mod. 44. 1 Mod. 205, 6. Adm. 3 Lev. 238.*

So, after part performed, he, to whom the promise was made, may discharge the residue by *parol.* *R. Ray. 42.*

So a subsequent inconsistent promise between the same parties discharges the precedent; as, if *A.* promise to marry *B.* within three months, and afterwards make a promise to her to marry her within four months. *Aggr. in B. R. 1658. between Hite and Chaplin.*

Otherwise, if the last time had been within the three months. *B. R. between Hite and Chaplin.*

So, if *A.* be indebted to *B.* and afterwards they come to an account for all matters between them, this is a discharge of the debt. *R. 2 Mod. 44. 1 Mod. 205. Vide in Pleader, (2 G. 11.)*

So, if upon a loan a man promise the re-delivery of the thing,
and

and afterwards a stranger, who has the property, by force without his consent takes it out of his possession, whereby he cannot re-deliver it; this taking is *quasi* an eviction, and discharges the promise. *R. Yel. 22.*

So, if an horse was lent, which before the re-delivery dies. *R. 1 Jon. 179. Dan. 67.*

So, if a man undertake to build an house before such a day, and afterwards a plague happens, and continues till the day; he shall be excused by this necessity for not doing it at the day, if he build it afterwards; for he is not obliged to hazard his life. *R. 1 Rol. 450. l. 30.*

But if the thing promised become afterwards impossible by the act of God, that does not excuse him; for he took upon himself to do it. *R. 1 Rol. 450. l. 20, 25. Vide Condition, (D. 1.)*

After performance, or after breach of a promise, a discharge by him to whom the promise was made, is not good without deed or other consideration. *Adm. 1 Sid. 177. 2 Mod. 44. R. 2 Mod. 259.*

As, if one promise 4*l.* to another, if he goes to *London*, and searches for a will; and he goes and makes search 15th *April*, an agreement between him and the defendant 16th *April*, that he shall not make the search, nor have the 4*l.* is not sufficient. *R. 2 Cro. (620.) Treswaller and Keyne.*

If he promise to deliver an horse, or give 5*l.* upon request, a discharge after request is not sufficient. *R. 1 Mod. 262.*

So, upon a promise for finishing such a business of the defendant, if after labour in it by the plaintiff, and before conclusion, he countermands him, that does not discharge his promise, but the plaintiff shall recover, as if he had not been countermanded before the finishing of the affair. *R. 3 Lev. 244.*

So, a discharge, or countermand by *parol* by him, who made the promise, before any breach or performance, is not good. *R. 2 Cro. 483. 1 Rol. 32. l. 45.*

So, payment of a sum, in satisfaction, after breach, shall not be a discharge. *R. 4 Mod. 250. Vide Accord, (B. 1.)*

(H) The Proceeding upon an *Assumpsit*.

(H. 1.) Original.

BY the *stat. 19 H. 7. 9.* like process shall be in actions on the case in *B. R.* and *C. B.* as, in trespass and debt.

And therefore, in *C. B.* (and likewise in *B. R.* when the proceeding there is by original,) the process must be attachment, distress, and so to outlawry.

(H. 2.) Declaration.

When a declaration in *assumpsit* shall be delivered. *Vide in Pleader, (C. 2, &c.)*

In what county it shall be brought. *Vide Action, (N. 11, 12.)*
Distinct

Distinct matter shall not be joined with it in the same declaration. *Vide Action*, (G.)

(H. 3.)
Must be
certain.

It must be certain ; and therefore if it does not shew the plaintiff, or defendant certainly, it is bad.

[If the declaration is, that the defendant and another *fecit* a promissory note, it is bad. *Neale v. Ovington*, M. 2 G. 2. Ld. Raym. 1544.]

[Or, that the defendant and another jointly or severally promised, it is bad ; it ought to be, jointly and severally. *Ibid.*]

If the declaration says, *quod def. solveret*, omitting *assumpsit super se*, it is bad. R. 1 Sid. 246. Dan. 74. Semb. 2 Rol. 464.

[If *super se assumpsit* is omitted, it is bad, even after judgment. *Lee v. Welch*. H. 1 G. 2. Str. 793. Ld. Raym. 1516.]

But, if the declaration says, That the defendant assumed *solvere* without saying *to whom*, it is good ; for it shall be intended to him from whom the consideration comes. *Vide ante*, (A. 5.) R. Noy 38. *Vide* 1 Sid. 246.

If it says, *quod cum assumpsit*, &c. without saying directly, *quod assumpsit*, it will be well. R. Hard. 1.

So, if the declaration says, that the defendant assumed to pay *eidem def.* (instead of *quer.*) it is good. R. 1 Rol. 15. l. 20.

So, if the name of the defendant be omitted, so that it does not appear *who* assumed ; for it shall be intended, that the defendant assumed. R. cont. Gro. El. 913. Noy 50. R. acc. Lut. 238. *Vide* Lut. 235. R. acc. 1 Sal. 26. 5 Mod. 305.

So, if in the second count the name of the defendant be totally omitted ; for that is coupled with the first. R. Lut. 235. Sal. 663. *Vide* 5 Mod. 306.

So, if it be said, that the defendant being indebted for money received to the use of *the defendant*, (for the *plaintiff*), it is good after verdict. R. inter Palmer and Starvelly, P. 13 W. 3. B. R. (Reported Sal. 24. 1 Ld. Ray. 669.)

So, if it be said, that *the plaintiff* assumed, (where it should be the *defendant*), it shall be aided after verdict, as a mistake of the clerk, where the plaintiff and defendant were well named before. *Vide Amendment*, (T. 2.)

And, by the *stat.* 16 & 17 Car. 2. 8. after verdict, no judgment shall be stayed or reversed for mistaking of the Christian or surname of the plaintiff or defendant in any declaration, &c. where the right name or surname, in the same or any preceding record, writ, plaint, or roll, is once truly alledged. *Vide Amendment*, (K. 1, 2.)

And therefore, if the plaintiff be named for the defendant, or *è contra*, it shall be amended after verdict. R. 1 Sid. 306. *Vide* Lut. 235.

But, if a declaration be, *quod cum quidem A.* was indebted to the plaintiff, the defendant upon forbearance assumed, &c. it will be well, tho' no Christian name of *A.* be mentioned. Court divided, 2 Lev. 197.

So, a declaration in *assumpsit* must shew the certain time, and place of the promise. *Vide in Pleader*, (C. 19, 20.)

So,

So, it must shew, that the undertaking was certain. *Vide ante*, (A. 3.)

Yet, if it be ascertained by an averment, it is sufficient; as, a promise to pay *quantum mereret*, with an averment *quod meruit tantum*, is good. *R. Cro. El.* 149. *R. 2 Cro.* 370, 619. *R. Cro. Car.* 77. *Vide ante*, (A. 4.)

To pay *quantum dispenderet* for officers, with an averment, that he expended so much for them. *R. Ray.* 9. *Vide in Pleader*, (C. 61.)

So, it must shew the certain cause of the debt for which the defendant made the promise; and therefore, *indeb. ass.* for money *ante tunc debuit*, is not sufficient, without saying, *for what cause due*. *R. 10 Co.* 77. *a.* *R. 2 Cro.* 207, 213, 642. *Hob.* 5. *R. Noy* 146. *R. 1 Bul.* 153. *R. after verdict*, *Cro. Car.* 6. 31. *R. 1 Sid.* 182. *R. 1 Sho.* 347. *Dan.* 69.

*But in *assumpsit* on the judgment of a foreign court, it is not necessary to state the cause of action on which judgment went. *Doug.* 1, 4, 5.*

So, for money *tam antea quam postea receptus* is bad; for that goes to a time after the action commenced. *R. 3 Lev.* 335. *Vide Action*, (E.)

Or, *quas solvissse debuisset secundum agreementum inter eos*; for perhaps the agreement was by deed, bond, &c. *R. 2 Lev.* 152.

But, for wares sold, money received to his use, &c. without saying, *for what wares in particular*, &c. is sufficient. *R. Hob.* 5. *R. 2 Cro.* 207, 245. *R. 1 Rol.* 24. *R. Mo.* 854. *R. Ow.* 123.

An *indeb.* for guineas lent, without saying, how many, is sufficient. *Per Holt.* *Sal.* 446.

And, if it say *indeb.* in 13*l.* 10*s.* for nine guineas, it shall be intended guineas of 40*s.* for there are such. *Sal.* 446.

So, for diet *pro diversis mensibus*, without saying, how many. *R. Sal.* 557.

So, *pro opere facto*. *R. 1 Mod.* 8. *1 Sid.* 425.

So, if it be *indebitatus pro salario*; *pro premio* upon a policy of such a ship, &c. it is sufficient, without saying, how many. *R. 2 Lev.* 153.

For goods sold to the wife, for the use of the husband. *R. 1 Sid.* 425.

[In action for meat and drink for a wife living separate from her husband, they must be described as found for the wife, and not for the husband generally. *Ramsden v. Ambrose*, *M.* 5 *G. Str.* 127.]

So, if the action is founded upon another consideration, as forbearance, &c. there is no need of shewing the cause of the debt. *R. 2 Cro.* 397, 548, 593. *R. Hob.* 18. 216. *R. 1 Brownl.* 14. *1 Bul.* 153. *R. 3 Bul.* 207. *R. Mo.* 853. *Dan.* 69.

So, an *indeb. ass.* *pro decimis*, *pro labore*, *pro servitio*, &c. *1 Sid.* 425. *Dan.* 69, 70.

So, in an *insimul computasset* for money due by the defendant to the plaintiff, it is sufficient, without saying, *for what cause due*. *R. Hob.* 88. *2 Cro.* 602.

So,

So, it must alledge the whole promise ; for *inter alia promissu* is bad. *R. Al. 5. Mar. 100.*

So, in consideration, *quod assuaret terras predict.* (reciting *quod cum fuit seisset, de diversis terris,*) is bad, without saying, *what lands* in particular. *R. Yel. 110.*

So, a declaration, that the defendant promised to pay his costs, without saying *how much he had expended*, is bad. *R. Cro. El. 276.*

That the plaintiff had done *multa beneficia* for the defendant, without saying, *what*. *R. after verdict. 1 Sid. 413.*

But, in consideration, that at the request of the defendant, *fecisset diversa vestimenta*, without saying *what* in particular, is good ; for the defendant knew they being made at his request. *R. per three J. Cro. Car. 573. R. 2 Sand. 373.*

Or, had found victuals for the defendant, his retinue, and servants, without saying for *whom*, or for *what time*. *R. Ray. 8.*

Or, had found necessities in his sickness, without shewing *what*. *R. 3 Bul. 31. 1 Rol. 173.*

So, a promise to pay *tantas denarios. summas rationabiliter habere meruisset*, without saying, *quantas ipse pro eisdem*, is sufficient. *R. Sal. 557.*

Or, *quantum habere meruit*, for *meritus fuit*, or *meruerit*. *R. Sal. 558.*

So, if the words, *in consideration*, are omitted ; where the action is founded upon a contract, which imports a consideration. *Lut. 237.*

So, if there are several counts for the same cause, without saying *alia*, it will be good after verdict. *R. 1 Sal. 213.*

(H. 4.)
Other re-
quisites.

So, it must alledge performance of the cause, or consideration of the promise. *Vide in Pleader, (C. 51.)*

Except where there are mutual promises. *Vide in Pleader, (C. 54.)*

Yet where there are mutual promises, if one thing is expressed to be done in consideration of a thing on the other part, and is to be done at a day subsequent, performance of the consideration must be alledged. *Vide in Pleader, (C. 53.)*

Otherwise, if it be to be done at a day precedent. *Vide in Pleader, (C. 55.)*

And it is not sufficient, that the performance be alledged in the words of the consideration to be performed, if it be not also according to the intent. *Vide in Pleader, (C. 58.)*

And it must shew an exact performance. *Vide in Pleader, (C. 59.)*

And so certainly, that the court may adjudge it to be well performed. *Vide in Pleader, (C. 60.)*

But if it shew a certain and exact performance, it is sufficient in general terms. *Vide in Pleader, (C. 61.)*

So, the declaration must assign a breach of the promise. *Vide in Pleader, (C. 44.)*

And it is sufficient to be assigned in the words of the promise. *Vide in Pleader, (C. 45.)*

Or,

Or, if it varies from the words, if it be pursuant to the sense and intent of the words, it is good. *Vide in Pleader*, (C. 46.)

But, if the breach assigned is larger or shorter than the promise, it is bad. *Vide in Pleader*, (C. 47.)

So, the declaration generally ought to assign a request, and notice. *Vide for this in Pleader*, (C. 69, &c. 73, &c.)

And ought to have a good conclusion. *Vide in Pleader*, (C. 84.)

But miscasting will not hurt it. *Vide in Pleader*, (C. 84.)

*In *assumpsit* for a fine assessed on admission to a copyhold estate, the plaintiff must prove that the sum laid to have been assessed, does not exceed two years improved value of the estate, for he cannot recover a less sum than that laid in the declaration, it being a precise duty. *Doug.* 731, 732.*

*But the declaration in such action may state generally, that the defendant was indebted to the plaintiff, in such a sum, (*viz.* the amount of all the fines due) for reasonable fines due and payable to him. *Id.* 727, in the notes.*

(H. 5.) Pleas in *Assumpsit*.

To a declaration in an *assumpsit*, the general issue is, *non assumpsit*. Cl. Ass. 71. (H. 5.)

And, if the defendant plead *not guilty*, it is bad upon a demurrer. *R. Cro. El.* 470. *R. Pal.* 393. *Non assumpsit.*

But it shall be aided after verdict by the stat. 32 H. 8. 30. *Vide Cro. El.* 470. *Marshall v. Gibbs*, M. 9 G. 2. B. R. H. 173. *Vide in Amendment*, (O.)

To several counts in an *assumpsit* upon several promises, the defendant may plead, *non assumpsit* generally. 1 Sid. 333. *R. Cro. Car.* 219. *R. 2 Cro.* 544.

So, in an action upon the case upon an *assumpsit* of the testator, if the defendant say, *non assumpsit* generally, it shall be good, after verdict. *R. 1 Sid.* 292. *Vide in Pleader*, (2 D. 8.)

But, to an intire undertaking he cannot plead, *non assumpsit* to part, and payment to the other part. *R. Mar.* 100.

By the stat. 21 Jac. 16. all actions of account, and upon the case, &c. other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced within six years after the cause of action, and not after. *Vide ante*, (D.) (H. 6.)

Provided, if any judgment be reversed by error, or arrested after verdict for the plaintiff, or be brought by original, whereon the defendant is outlawed, and the outlawry reversed, the plaintiff may have a new action in a year after such reversal, or arrest of judgment, and not after. *Non assumpsit infra sex annos.*

Provided an infant, *feme covert*, *non compos*, a person in prison, or beyond sea, at the time of the cause of action accruing, shall have liberty to bring an action within six years after being of full age,

age, discover, of sane memory, at large, or returned from beyond the seas.

And therefore, if the cause of action arose six years before, the defendant may plead, *quod non assumpsit infra sex annos*. 2 Sand. 118.

And the plea does not vary, tho' ninety-two days by the *stat.* 1 *W. & M.* are excluded out of the six years; for that shall come from the other side. *R.* 3 *Lev.* 283.

And this plea admits a cause of action before the six years. 2 *Vent.* 151.

And therefore, the plea will not avail, if he promise within six years, tho' it be without a new consideration. *R. per ten J. H.* 10 *W.* 3. *Semb.* 2 *Vent.* 152. 5 *Mod.* 426. *Carth.* 471. *Sal.* 29.

[If plaintiff, as assignee of a bankrupt, declares that defendant was indebted to bankrupt, and promised to plaintiff, and defendant pleads the cause of action did not accrue to bankrupt within six years, it is ill. *Skinner v. Rebow, M.* 5 *G.* 2. *Str.* 919.]

[So, it cannot be pleaded after money is paid into court. *Mead v. Wyndham, H.* 1721. *Bunb.* 100.]

Or, if he acknowledge the debt within six years, it is evidence, though not conclusive. *R. per ten J. H.* 10 *W.* 3. 5 *Mod.* 426. *Carth.* 471.

Or, if he say, *Prove it due, and I will pay you.* Per Holt, and nine other *J. H.* 10 *W.* 3. *Carth.* 471. *Sal.* 29. 5 *Mod.* 426.

Yet, a conditional promise within the six years is not sufficient. Per Holt, at Hertford, 13 *W.* 3.

Nor, in an action against several, who all plead *non assumpsit*, is it sufficient for the plaintiff, that one of them promised within the six years. *R. per three J. Vent. cont.* 2 *Vent.* 151.

The defendant must plead the statute, otherwise the plaintiff shall recover, tho' the declaration alledge a promise six years before. 1 *Vent.* 191. *R. Cro. Car.* 160. *R. cont. Cro. Car.* 115. *Dub. Cro. Car.* 163. *Vide Cro. Car.* 294. where the statute was pleaded after error brought. *R. acc. Cro. Car.* 381, 404. *R.* 1 *Lev.* 110.

The defendant used in *non assumpsit infra sex annos* to recite the statute at large. 2 *Mod. Ent.* 142.

But now it is not the course, nor is it necessary. 2 *Sand.* 118, 123.

Yet, *non assumpsit infra sex annos ante billam*, is not well; for the defendant ought to say, *quod causa actionis non accrevit infra sex annos.* *R.* 1 *Vent.* 191. But the precedents are *cont.* 2 *Sand.* 118, 123. *Lut.* 243, 257. 2 *Vent.* 255.

And therefore, if a promise be ten years before, to pay upon request, &c. and request be made within the six years, the statute is no good plea; for the cause of action was the request. *R. Cro. Car.* 139. *R.* 1 *Lev.* 48.

So, where the consideration of the *assumpsit* is executory, the plea must say, *causa actionis non accrevit, &c.* *R. Sal.* 422.

So,

So, in an action by an administrator, if the administration was granted within the six years, tho' the intestate died before the six years. *Skin. 555.*

[If a writ is taken out in time, and plaintiff dies, and his executor suffers four years to elapse before he proceeds, *causa actionis non accrevit infra sex annos*, is a good plea. *Wilcocks v. Huggins, T. 5 G. 2. Str. 907.*]

[On *non assumpsit infra*, &c. coverture, release, set-off, cannot be pleaded, but on *non assumpsit* they may. *Barnes 361.*]

[The statute of limitations may be replied to a plea of set-off. *Remington v. Stevens, T. 21 G. 2. Str. 1271.*]

To *non assumpsit infra sex annos*, the plaintiff may by replication (H. 7.) say, that he or she was an infant, *covert*, &c. when the cause of action accrued, and sued within six years after full age, &c. *Lut. 243. R. 2 Sand. 120. 2 Sid. 453.* Replication to *Non assumpsit infra sex annos.*

And tho' in the *proviso* for infants, &c. *trespass* only is mentioned, and not *trespass upon the case*, yet all *actions upon the case* are within the equity of this *proviso*. *R. 2 Sand. 120, 121. 1 Sid. 453. R. Lut. 243. R. per three J. 2 Mod. 72.*

And, though the six years elapse during the nonage, an infant may sue afterwards during his infancy, without waiting till his age. *R. 2 Sand. 120, 121.*

So the plaintiff may reply, that the defendant was out of the realm. *R. cont. 1 Sho. 99. R. cont. Sal. 420. R. cont. Carth. 137. Adm. acc. by the stat. 4 & 5 Ann. 16.*

[That the plaintiff was beyond sea, is good in an action on a bill of exchange. *Rochtschilt v. Leibman, T. 3 G. 2. Str. 836.*]

But he cannot reply, that the defendant had privilege of parliament. *R. 1 Sho. 99. Vide Carth. 137.*

So, the plaintiff may say by his replication, that he purchased another original, upon which the defendant was outlawed, and afterwards the outlawry was avoided, and he sued within a year. *Cro. Car. 294. Jon. 312.*

And this, when the outlawry is avoided by plea, or reversed by error. *R. per three J. R. Cro. Car. 295.*

Or, the plaintiff may reply, that heretofore he obtained a judgment, and that was reversed, and he now sues within a year after the reversal.

Or, that he obtained a verdict.

So, another action commenced by his testator, who died. *Sal. 425.*

Or, commenced in an inferior court, which was removed by *habeas corpus*. *R. Sal. 424.*

[A plaint in the sheriff of London's court, in *indebitatus assumpsit*, is good, tho' the action in B. R. is on a promissory note. *Per three J. contra Fort. Story v. Atkins, M. 13 G. Str. 719. Ld. Raym. 1427.*]

Or, that he had sued another original, which was returned and continued, and that within six years before that original the defendant promised. *Semb. Lut. 260.*

Or,

Or, that the plaintiff sued a *latitat*, which was continued, and was to the intent that the plaintiff might declare upon it for the same cause. 2 *Mod. Int.* 140. 1 *Sid.* 53.

[A *latitat*, without shewing a bill of *Middlesex*. *Hollister v. Coulson*, P. 9 G. Str. 550. *Croat v. Jones*, Str. 734. *Ld. Raym.* 1441.]

Or; a writ of privilege continued. *Carth.* 144.

That he sued a writ for a battery in *London* with intent to declare for trespass, upon which the defendant was outlawed, and within a year after the reversal, he commenced this action for trespass in *Middlesex*. R. 3 *Lev.* 245. R. *Jon.* 312. *Vide Cro. Car.* 294.

But the plaintiff cannot reply, another original sued by his testator who died and so it abated; for that is not within the provision of the *stat.* 21 *Jac.* 1. 16. R. *Lut.* 264. *Semb. cont. Sal.* 425.

Or, that he sued a *clausum fregit* with intent to declare in the same action. *Dub. Lut.* 254. 2 *Vent.* 255. *Semb. Lut.* 260, for there it was R. *cont. per three J. in C. B.* but that was reversed in *B. R.* and the reversal affirmed in parliament, tho' principally upon another point; yet it was said, that it was hard to be maintained. R. *Lut.* 280.

[Bankruptcy and assignment to plaintiff, and that the cause of action arose within six years before the assignment, is not good. *Gray v. Mendez*, T. 9 G. Str. 556.]

So, if the plaintiff reply, an original, it is necessary that he alledge it to be returned, or the appearances or continuances upon it. R. *Lut.* 260.

And he must shew all the continuances at large; for *taliter processum* thereupon, is not sufficient. R. *Sal.* 420.

So, he must shew a good original, or bill of *Middlesex*; for if it is returnable upon the day of the *teste*, it is not sufficient. R. *Sal.* 421.

[Replication of a *latitat* or *clausum fregit*, must set out the process, and continue it to the time of the declaration. *Croat v. Jones*, M. 13 G. Str. 734. *Ld. Raym.* 1441.]

[But replication of an original writ, (and an attachment of privilege is in the nature of original writ) need only set out the *teste*, not the return, nor continuances. *Finch v. Wilson*, T. 21 G. 2. 1 *Wils.* 167.]

So, the plaintiff cannot reply, that it was for an account between merchants, for this exception goes only to accounts current, not to stated accounts. R. 3 *Sand.* 127. *Vide ante*, (D.)

So, the plaintiff may reply generally, *quod causa actionis accrevit infra sex annos*.

If the defendant plead, that the causes of action, nor any of them, accrued within six years, it is a good replication, that the causes of action, or some of them, did accrue. R. *Lut.* 1607.

And, if the plaintiff be intitled by administration, it is sufficient, if the administration was granted within the six years. R. *Sal.* 421. *Carth.* 337.

But,

But, a replication to *non assumpsit infra sex annos* must conclude with an averment; not to the country. *R. 4 Mod. 376. Carth. 337. Vide Pleader, (E. 32.)*

*In order to save the statute of limitations, a bill may be filed in vacation against an attorney. *Doug. 315. in the notes.**

*So a fraud may, in many cases, be replied to the statute of limitations. *Doug. 656.**

*An acknowledgment of the debt after the commencement of the action, takes it out of the statute of limitations. *2 Bur. 1099.**

And the least acknowledgment is sufficient.

So, to an *assumpsit*, the defendant may plead in discharge, 1. (H. 8.) Tender.—2. Within age.—3. Outlawry, or recusancy in the plaintiff.—4. Foreign attachment.—5. Composition with creditors.—6. The statutes of usury.—7. The statutes of gaming.—8. Accord with satisfaction.—9. Arbitrament.—10. *In simul computaverunt*.—11. A bond given for the debt.—12. A discharge of the promise.—13. A release.—14. Performance of the promise. Pleas in discharge.

[Tender is pleadable to *quantum meruit*. *Johnson v. Lancaster, M. 10 G. Str. 576.*]

As to these pleas. *Vide in Pleader, (2 G. 2. &c.)*

But he cannot plead in abatement, that he was his bailiff to render an account. *R. 1 Sal. 9. Sho. 71.*

Nor, can he traverse a consideration, that is executed. *1 Sho. 78.*

To plead *exoneravit* generally, will not do; for defendant must shew *how* he was discharged. *Hillier v. Plympton, P. 7 G. 1. Str. 422.*

ACTION upon the Case for a Conspiracy.

(A) When it lies.

A Writ of conspiracy lies, when two or more by malice or covin conspire to indict another falsely, who is acquitted. *F. N. B. 114. D. 2 Bul. 271. 1 Sand. 230.*

If only one person labour the indictment, conspiracy does not lie, but an action upon the case in nature of conspiracy. *F. N. B. 114. D. 116. L. Cro. El. 701. Jon. 94. 2 Cro. 193.*

So, if husband and wife conspire, without any other; for they are but one person. *F. N. B. 116. L.*

But, for indicting for trespass, or other falsity, conspiracy lies against one; for it is properly an action upon the case. *F. N. B. 116. A, K. 1 Sand. 230.*

And

And conspiracy, or an action upon the case in nature of conspiracy, lies for a malicious indictment for felony, if the party be acquitted thereof. *R. 1 Rol. 114. l. 30.*

[It lies tho' the court has not granted a copy of the indictment. *Jordan v. Lewis, M. 13 G. 2. Str. 1122.*]

Tho' after the indictment an appeal is brought, and the plaintiff in the appeal is nonsuited after the declaration or before; for upon nonsuit in the appeal, he shall be arraigned upon the indictment, and being acquitted, the action will lie. *F. N. B. 114. E.*

So, it lies, if a man bring an appeal maliciously for felony, and is nonsuited; tho' there was not any indictment. *F. N. B. 114. E. Vide 3 Leo. 140.*

And if an appeal be against one as principal, and another as accessory, and the plaintiff is nonsuited, the accessory shall have the action, as well as the principal. *F. N. B. 115. A.*

So, it lies, for a malicious indicting of one as principal, and another as accessory, by the accessory, if the principal be acquitted, whereby the accessory is discharged. *Ibid.*

So, it lies if the party be acquitted upon the indictment, tho' the appeal be not determined; for his life was in jeopardy. *F. N. B. 115. H.*

And, by the *stat. 8 H. 6. 10.* if he be indicted or appealed for treason, felony, or trespass, in a foreign country, and acquitted, he shall have conspiracy, and recover treble damages. *Ibid.*

So, by the *stat. 18 H. 6. 12.* he shall have conspiracy, if he be indicted, where there is not any such place within the county. *Ibid.*

So, it lies for a malicious indictment for treason. *Cont. 2 Cro. 357. 2 Bul. 270. 1 Rol. 113. l. 5. But R. acc. 1^o Car. 1. 1 Rol. 113. l. 10. Cro. Car. 15. 2 Bul. 271. Jon. 95. Lat. 79.*

So, it lies for a malicious indicting for a trespass. *F. N. B. 116. F. R. 1 Rol. 112. l. 43. R. 2 Mod. 51. 306. D. Ray. 176. R. 1 Sal. 14.*

Or, for barrettry. *R. 1 Rol. 112. l. 45. 2 Cro. 32. Semb. Ray. 180. Dub. Cro. El. 564.*

Or, for hunting in a park. *F. N. B. 116. C.*

Or, for not arresting a felon, who passed by the town. *F. N. B. 116. A.*

Or, for indicting upon the *stat. 8 El. 2.* for arresting in another name. *R. Ray. 135.*

Or, for a *rescous*. *Dub. Ray. 135, 180. in marg. 1 Sid. 261.*

Or, for discharging a vagrant contrary to law. *R. Ray. 180.*

Or, for any thing that prejudices his reputation. *1 Sal. 14.*

Or, for any thing that indangers his life or liberty. *Ibid.*

So, it lies for procuring an action to be brought against another, maliciously. *F. N. B. 116. E. Ray. 176. Vide Action upon the Case for a Deceit, (A. 4.)*

Or, for forging false deeds, giving them in evidence. *F. N. B. 116. D.*

Or,

Or, for presenting to a benefice in the name of another, and causing the clerk to be instituted and inducted. *F. N. B.* 116. *G.*

Or, for causing a false office to be found for my land. *F. N. B.* 116. *H.*

So it lies for a malicious indicting before a mayor or bailiffs in a city, or borough, &c. who have a power of gaol delivery; for an acquittal before them is a discharge of the felony. *F. N. B.* 115. *B.* *Reg.* 134. *b.*

So there may be an action upon the case for a conspiracy in an indictment, tho' he be not acquitted; but conspiracy does not lie without an acquittal. *Per Dodr.* 2 *Rol.* 49.

So, an action upon the case in nature of conspiracy lies for a malicious prosecution, tho' *ignoramus* be found, or he be not indicted. *R. sape,* 1 *Rol.* 114. *l.* 15, 25, 35. *Yel.* 46. *Lat.* 79. 1 *Sal.* 14. *R.* 2 *Cro.* 490.

Or, the indictment be insufficient. 1 *Sal.* 14. *R.* 1 *Sal.* 15. *in marg.*

Or, tho' he be convicted. *Adm.* 1 *Rol.* 112. *l.* 50.

So, if he was imprisoned, or received other damage upon it, tho' the party proceeded no farther. 1 *Sal.* 14. *Mod. Ca.* 179.

If a *nolle prosequi* be entered upon the indictment. *Dub.* 1 *Sal.* 21. *Vide Mod. Ca.* 261.

So it lies, *quia crimen felonie imposuit* without cause. *R. sape,* 1 *Rol.* 114. *l.* 40.

And without other act alledged. *R. Sho.* 282.

Tho' he went before a justice of peace. *R.* 2 *Cro.* 191.

As, if a man having lost his sheep sees another driving twenty sheep with twelve several marks, and upon that takes a constable and arrests him. *R.* if the sheep are not averred to be stolen. 1 *Rol.* 113. *l.* 45.

Or, if his goods are stolen, and he goes to a justice of peace, and falsely charges *B.* by express name for the felony, and when he is bound to the sessions does not prosecute afterwards. *R.* 3 *Leo.* 100.

So, it lies for a malicious conspiracy to cause a tavern to be reputed a bawdy-house. *R.* 2 *Mod. Ca.* 215.

[It lies against husband, wife and servants, for giving money severally to an apprentice to spoil his master's goods in the makings, to ruin his trade, though only one of the defendants present at a time. *Rex v. Cope,* *H.* 5 *G.* *Str.* 144.]

So, it lies for a malicious presentment in the spiritual court for adultery by a churchwarden. *R.* 1 *Rol.* 112. *l.* 35.

For a malicious exhibiting articles there, with an intent to defame, and a special damage. *Semb.* 1 *Rol.* 112. *l.* 5.

For a malicious citation there, upon which he was excommunicated. *R.* 1 *Vent.* 86. *Ray.* 418.

For a malicious citation there by an apparitor. *R.* *Jon.* 312. 1 *Rol.* 63. *Cro. Car.* 291.

Vide post. (B.)

(B) When it does not lie.

BUT, if a man be indicted for felony, and afterwards an appeal is sued against him, and he is acquitted by verdict, he shall neither have conspiracy, nor an action upon the case, because he is not acquitted upon the indictment. *F. N. B. 114. E.*

So, if an appeal is sued when there is not any indictment, and the defendant is acquitted by verdict; he shall not have conspiracy; for he has a remedy by the *stat. W. 2. 12. F. N. B. 114. F.*

So, conspiracy does not lie, nor an action upon the case, against a judge of assize, justice of peace, or other justice by commission upon record, who is sworn, for any thing done in public, as a judge, or justice. *R. 12 Co. 24. Mo. 6.*

Tho' he do that which is illegal. *Lut. 1561. R. 2 Mod. 219.*

Nor, against any of the grand jury, or petit jury, for a thing done, when sworn, tho' the party be acquitted. *R. 12 Co. 23. F. N. B. 115. C. D. R. Bridg. 131.*

Nor, if the party be convicted. *R. 12 Co. 23. Semb. Ley. 69.*

Nor, against any one who comes into court, and discovers a felony, and gives evidence to the inquest. *F. N. B. 115. D.*

Yet, if a judge, out of court, suborn witnesses, and maliciously threaten indictors to find any one guilty, an action upon the case lies against him. *R. 12 Co. 24. a.*

So, if a jury conspire, after he is discharged from the jury, conspiracy lies. *F. N. B. 115. D.*

So, if a justice of peace without any accusation, send his warrant against a man for felony, whom he knew not to be guilty. *R. Cro. El. 130. 1 Leo. 187.*

Or, refuse to do that, which is ministerial: as, to give an oath to the party robbed. *2 Mod. 220. Vide 1 Leo. 323, 4.*

So it does not lie for a legal prosecution. *Semb. 1 Rol. 112. l. 25. 114. l. 10. R. Yel. 105. 116.*

As, if a man, upon a just cause of suspicion, causes another to be bound by a recognisance to appear, and to be indicted. *R. 1 Rol. 113. l. 35. 40. R. 2 Cro. 130. R. Cro. El. 871. 900.*

Tho' no felony was committed. *R. 1 Rol. 113. l. 30. 40.*

Tho' he does not shew any cause for his suspicion. *Cro. El. 871.*

So, if a man complain to a justice of peace against *A.* for battery, &c. upon which process is awarded against him to find sureties for his good behaviour. *R. 3 Leo. 123.*

Or, complain to a justice, that *A.* committed felony, and afterwards by the command of the justice prosecutes him. *R. Mo. 6.*

So, it does not lie for suing in *London*, for a matter out of their jurisdiction; for it might have been pleaded there. *Semb. Carth. 190.*

So, an action upon the case does not lie for a malicious prosecution, where the judgment of the court is against the plaintiff; for by indirect means the judgment would be avoided; as, after conviction, though the prosecution was malicious. *Per Hale, Hard. 195.*

Nor, after a seizure for non-payment of customs, and condemnation upon proclamation. *R. Hard. 194.*

[Nor, against one exhibiting information for intention to land goods without paying duty, if the goods are condemned by the sub-commissioners, though the commissioners of appeal reverse the condemnation. On error, from Ireland. *Reynolds v. Kennedy, M. 22 G. 2. 1 Wils. 232.*]

So conspiracy does not lie, (tho' an action upon the case will,) if the defendant be not *legitimo modo acquietatus*. *Jon. 94.*

As, if he be pardoned by act of parliament; altho' he plead, and be acquitted, and will not take advantage of the act; for his life was not in jeopardy. *F. N. B. 115. G.*

So, the accessory shall not have conspiracy, if the principal die, or be pardoned. *F. N. B. 115. F.*

So, conspiracy does not lie, if the jury find *ignoramus* upon the indictment. *R. 2 Cro. 8.*

Or, the indictment be discharged by *nolle prosequi*. *Sal. 456. Mod. Ca. 262.*

Or, upon a misprision of the action recited in an indictment of perjury. *R. Cro. El. 725.*

Vide ante, (A.)

(C) The Proceeding in Conspiracy, or in an Action upon the Case in Nature of Conspiracy.

(C. 1.) The Writ.

IN an action for a conspiracy it is necessary, that the writ be, *conspiratione inter eos habita*. *Reg. 134.*

But, in an action upon the case in nature of conspiracy, these words are not necessary.

Yet these words may be in an action upon the case in nature of conspiracy. *R. per three J.* But *Morton Semb. cont.* and so *Semb. Sand.* for he says, that these words shewed a formed action of conspiracy. *1 Sand. 229, 230.*

An action for a conspiracy must be against two or more; but an action upon the case in nature of conspiracy may be against one. *Vide ante, (A.)*

And therefore, in an action for a conspiracy, if all are found by verdict, Not-guilty, except one, the plaintiff cannot have judgment; for his action fails. *F. N. B. 115. E.*

[But if there is a special action upon the case for a malicious prosecution, against two, and one is acquitted and one found guilty, plaintiff shall have judgment. *Subley v. Mott, H. 21 G. 2. 1 Wils. 210.*]

ACTION upon the Case for a Conspiracy.

So, in an indictment or information, for doing a thing *per conspirationem inter eos habitam*. R. 3 Mod. 220.

Otherwise, in an action upon the case in nature of conspiracy. R. 1 Rol. 111. l. 15. 112. l. 35. R. 1 Sand. 230. 1 Vent. 12. 18. R. Ray. 176. 180.

So, in a writ of conspiracy, if one plead to the writ, and the other to matter in law, and it be found by verdict, against him who pleaded to the writ, and adjudged for him who pleaded to the matter in law, yet the plaintiff shall have judgment against the one who pleaded to the writ; for it may be, that they conspired, though the matter in law is adjudged for the other. F. N. B. 115. E.

(C. 2.) The Declaration.

(C. 2.)
Must be
laid in the
proper
county.

The declaration upon conspiracy shall be laid in the county, where the conspiracy was, or where the thing contrived to be done was done. F. N. B. 116. M. 7 Co. 1. b. *Vide Action*, (N. 11.)

But, if the conspiracy be in one county, and the indictment, without their privity, in another, it shall only be, where the conspiracy was, not where the indictment. F. N. B. 116. M. 7 Co. 1. b.

So, it shall not be in the *Marshalsea*, or an inferior court, when the indictment was tried in B. R. 2 Mod. Ca. 307.

The declaration may suppose the conspiracy in two several places. F. N. B. 116. M.

(C. 3.)
Must sup-
pose the
fact to be
false and
malicious.

The declaration must suppose the fact done by the defendants to be false and malicious; and this is an action upon the case, as well as in a writ of conspiracy.

And therefore, in an action upon the case, if the plaintiff declare, that the defendant carried him before a justice of peace, and, when he was discharged by the first justice, carried him before another justice, and *malitiose* caused him to be bound by recognisance to the assizes, and there *falso et malitiose conatus fuit* to have him indicted of felony, it is not good; for the *falso et malitiose* is to endeavour to have him indicted, not to the procurement, which was *malitiose*, and not *falso*. R. after verdict. 1 Rol. 111. l. 25.

So if the declaration say, *falso et injuriose* procured, &c. it is not sufficient. Semb. 1 Rol. 112. l. 25.

But that the defendant *ex militia sua defamare*, &c. *falso et invidiose crimen feloniam imposuit, et malitiose* procured him to be indicted, is sufficient; for upon the whole declaration, it appears to be malicious. R. 1 Rol. 115. l. 15.

Or, that the defendant *malitiose intendens defamare*, &c. *indictari fecit, et falso deposuit*. R. 1 Leó. 108.

(C. 4.)
Must shew
the plain-
tiff was
indicted

The declaration must shew, that the plaintiff was indicted before justices, who had authority to take the indictment; and therefore, if it alledge an indictment for treason before A. and B.

B. justices of C. B. ad pacem et aud. et terminand. ad generalem gaol deliberationem, &c. it is bad; for it does not shew, that *A.* proper jurisdiction, and *B.* were justices for *gaol-delivery*, but only that the indictment and upon a was found before them at a *gaol-delivery*. *R. 2 Cro. 357. 2 good indictment. Bul. 271.*

And, if it be before justices of *gaol-delivery*, it must shew, that the defendant was in *gaol*; but *ductus ad barram* implies it. *R. Cro. Car. 553.*

And, if it alledge an indictment for *barretry* before *A. and B. Justices of assize*, it is bad, unless it say, *justices of oyer and terminer*. *R. Cro. El. 564.*

So, if the declaration do not say, before *what judge*. *R. Cro. El. 724, 5.*

But, if the declaration alledge the indictment before *justices of oyer and terminer*, it is sufficient, though it do not shew that they were such persons as might be justices of *oyer and terminer*; for that shall be intended. *R. after verdict. 1 Sid. 15.*

And, if the commission be erroneous, yet the action lies; for it is a great slander. *Semb. 1 Rol. 111. l. 45. 1 Sid. 15.*

So, if it do not shew the authority of the justices, *ad generalem sessionem, &c.* supplies it. *R. after verdict. Yel. 116.*

So, the declaration must shew a good indictment, otherwise he cannot be lawfully acquitted; and this, in an action upon the case, which alledges that he was indicted and acquitted, as well as in conspiracy. *R. 1 Rol. 110. l. 45. D. cont. Yel. 46.*

And therefore, if there be an indictment for *deceit* in the sale of *one flacking*, omitting, *pair*; an action for conspiring such indictment does not lie. *R. 1 Rol. 110. l. 50.*

*The action lies, tho' the indictment was bad, and exception taken to it by the judge, and the party acquitted, without the examination of a witness; and advertisements concerning it may be given in evidence, tho' an information granted on them as a libel. *Str. 691.**

But, it is sufficient if an indictment be for the goods of a *feme covert*; for it shall be intended her goods when sole. *R. after verdict. 1 Rol. 111. l. 5.*

So, if the declaration shew a good indictment, and before justices, who have authority, if upon *oyer* by the defendant it appears, that the indictment was before other justices, who have not the same authority, the declaration is bad: as, if an indictment is alledged before justices of *assize*, and upon *oyer* it appears to be before justices of *gaol-delivery*; for they have a distinct authority. *Vide Yel. 46.*

Otherwise, if the indictment be alledged before justices *ad diversas felonias nec non ad pacem, &c.* and upon *oyer* it appears, to be before justices *ad pacem* only; for they have the same authority. *Per four J. Williams, cont. Yel. 46. 2 Cro. 32.*

So a small variation between the indictment produced, and that alledged in the declaration, does not prejudice; as, if the name of a juror be *Lancaster* in the record, and *Lancester* in the declaration. *R. Al. 91.*

So,

(C. 5.)
And that
he was
lawfully
acquitted.

So, a declaration for a conspiracy in an indictment, must shew, *quod fuit legitimo modo acquietatus*. R. 9 Co. 56. 12 Co. 23.

And a declaration for a conspiracy in an appeal, where he was non-suited, must shew, *quod per considerationem curie quietus necessit*; for if it be, that he was acquitted, it is bad; for it shall be intended an acquittal by the country. Reg. 134. b. Vide F. N. B. 115.

And, an action upon the case in nature of a conspiracy for indicting, must say, *that he was acquitted*, or *ignoramus* found. Semb. upon Demurrer, per Twisd. 1 Sid. 15.

[It must be shewn how the indictment was determined. Lewis v. Farrel, M. 5 G. on Demurrer. Str. 114.]

But the omission is aided after verdict, in an action upon the case. Per Twisd. 1 Sid. 15.

And, *Juratores dixerunt quod ignorabant*, is tantamount to *ignoramus*. R. con. 20.

And, *quod fuit acquietatus*, without saying, *inde acquietatus*, is sufficient in conspiracy, or action upon the case. R. in the one and not in the former. 2 Cro. 131.—R. in both. 2 Cro. 230. Tel. 161.—R. in an action upon the case, Cro. Car. 286, 315, 419.

The Plea,

Vide Pleader, (2 K.)

Vide more of Conspiracy, in *Justices of Peace*, (B. 107.)

ACTION upon the Case for a Deceit,

(A) When it lies,

(A. 1.) For Deceit in Play.

AN action upon the case for a deceit lies, when a man does any deceit to the damage of another.

As, if a man play with false dice, and thereby win the money of another. R. 1 Rol. 100. l. 40. F. N. B. 95. D. R. Cro. El. 90.

Though he do not intice the other to play; for the inticement is not the cause of the action, but the using false dice. F. N. B. 95. D.

So if a man practice deceit at cards, and thereby win money. R. Mo. 776. (a)

(a) In all such cases an action for money had and received will lie, and is therefore more eligible as being better known and understood. 1 Morgan's Vad. Mer. 164.

(A. 2.)

(A. 2.) Forgery, &c.

So, if a man forge a statute merchant, &c. in my name and sue a *capias* upon it, whereupon I am taken. *F. N. B.* 96. *B. Reg.* 112. *b.* 114. *b.* 115. *a.*

Or, forge a grant of a presentation, and make use of it in a court christian. *F. N. B.* 96. *C. Reg.* 112. *b.* 116. *b.*

Or, forge letters of resignation of a benefice. *F. N. B.* 99. *K. Vide Reg.* 114. *b.*

So, if he obtain money from another by counterfeit letters to his servant. *R.* 2 *Cro.* 223.

So, if he raze the name of the obligor out of a bond, and insert the name of *A.* and then sue him. 1 *Rol.* 100. *l.* 15.

Or, if a parson raze the name of *A.* and insert *B.* and publish him in the church as excommunicated. *R.* 1 *Rol.* 100. *l.* 20. *Cro. El.* 838.

(A. 3.) Personating.

So, it lies, if a man falsely personate another: as, if a man sue a writ in my name without my privity, for which writ a fine ought to be paid in *Chancery*; (as the course is for every writ of debt of the value of 40*l.* or more, and for every *præcipe quod reddat*, except right patent, for land of the annual value of five marks.) *F. N. B.* 25. *E. Reg.* 112. *a.*

Or, purchase a *quare impedit* in my name, without my privity; and then abate it, or be nonsuited. *F. N. B.* 96. *a. Reg.* 112. *a.*

Or, sue a *capias*, &c. in my name against *A.* whereby he is arrested. 7 *Co.* 4. *b.*

Tho' the process be erroneous; for the defendant cannot take advantage of the error. *R.* 7 *Co.* 4. *b.*

So, if a man appear in court in the name of another, and confess the action. *F. N. B.* 97. *a.*

Or, acknowledging a fine. *Reg.* 113. *b.*

Or, become bail in an action there depending.

Or, acknowledge a statute in the name of another. *F. N. B.* 100. *a.* 1 *Rol. Ab.* 100. *l.* 5.

Or a judgment or recognisance. 1 *Rol.* 100. *l.* 5.

So, if a man is sworn upon an inquest in the name of another who is impannelled. *Per two J. Mar.* 81.

So, if a man falsely affirms to *A.* who has money to deliver to *B.* that he is *B.* *R. Mo.* 538.

(A. 4.) Tortious Proceeding in Law.

So, if a man proceed against another at law *deceptive*; as, if *Vide Action* tenant in *ancient demesne* levy a fine in *C. B.* to make his land upon the case frank-free, the lord shall have deceit, and shall avoid the fine. for a conspiracy, (A)
2 *Infl.* 216, 217. in marg. *F. N. B.* 98. *A.* 10 *Co.* 50. *a.*
Vide in Ancient Demesne, (E. 2.)

So,

So, if more lands are inserted in a fine, than the conusor intended, deceit lies, and the fine shall be avoided. 2 *Inst.* 216.

So, upon the *stat. M. Ch.* 9 *H.* 3. 24. if the tenant purchase a *precipe in capite*, by which the lord loses his court, the lord shall have deceit, and recover his damages, but shall not avoid the judgment. 2 *Inst.* 39. 1 *Rol.* 101. *l.* 25. *F. N. B.* 98. *M.*

So, if a man make use of the process of law for delay: as, if *A.* having recovered against *B.* in an assise, remove the record into *B. R.* or *C. B.* to have execution of the damages, and *B.* to defraud the execution sues a writ to remove the record into *Chancery* upon a surmise that he will sue an attaint, but does not sue an attaint. *F. N. B.* 96. *E.* *Reg.* 113.

If a man sue a protection for delay; as, a protection *quia moraturus*, when he is within the kingdom. *F. N. B.* 97. *R.* 1 *Rol.* 100. *l.* 25. 35.

A protection *quia profecturus*, when he does not go. 1 *Rol.* 100. *l.* 28. *Reg.* 113. *b.* *Vide F. N. B.* 97. *b.* in margin.

Otherwise if he be stayed by sickness. 1 *Rol.* 100. *l.* 30.

So, if he confesses a judgment to *A.* to defeat an action brought against him by *B.* *R. Carth.* 4.

So, if a man procure a vexatious suit; as, if a man sue a *capias* upon a forged statute. *F. N. B.* 96. *B.*

If a man procure another to commence an action in any court against *A.* to vex him. *F. N. B.* 98. *N.* 2 *Inst.* 444. 1 *Salk.* 14.

Or sue in the name of another upon a recognizance satisfied. *F. N. B.* 100. *B.*

Or, sue in the name of *A.* without his privity; tho' it be for a just debt. *R. Mar.* 48. 1 *Rol.* 101. *l.* 50.

Or, procure a *scire facias* to be sued, and two *Nichils* returned against him, who was not bail. *R. Cro. El.* 628.

Or, prosecute the bail, when he knew the principal was surrendered. *R. 2 Cro.* 667.

So, if a man chase *A.*'s cattle into *B.*'s close, *per quod* he is subjected to an action by *B.* 1 *Rol.* 100. *l.* 52.

Or, make use of process vexatiously; as if after a debt levied by *feri facias*, knowing it, he sues another *feri facias* for vexation. *R. 1 Rol.* 103. *l.* 5. 34. *l.* 5. 1 *Brownl.* 12. *R. Hob.* 205, 266. (a)

Otherwise, if he knew nothing of the first execution. *Agr. Hob.* 266.

So, if he takes *A.*'s goods *scienter*, upon an attachment against *R.* *R. 1 Sid.* 183. 1 *Lev.* 129.

Tho' the *scienter* is omitted. 1 *Lev.* 129.

So, if a man arrest another in *London*, when he knows that he was formerly discharged upon an arrest there by *habeas corpus* for a priority of suit. 1 *Rol.* 102. *l.* 10.

If the bail remove a cause in *London* by *habeas corpus* into *B. R.* and there put in insufficient bail by which the first bail in *London* are discharged, after a *procedendo*. *R. 1 Rol.* 102. *l.* 40. *R. Cro. El.* 714.

(a) In this case, it is conceived, the court would on motion order the second execution to be set aside, and the goods to be restored. 1 *Morgan's Vade Mec.* 166.

So, if the bail inform the clerks of *B. R. deceptivæ*, that the second bail is sufficient; though they do not procure the *habeas corpus*. *R. 1 Rol. 102. l. 50.*

So, if a man sue vexatiously; as, if he sue in an inferior court, and has judgment, and execution, when the defendant knew nothing of the suit. *Lut. 67.*

Or, sue in the spiritual court, till the defendant be excommunicated, who knew nothing of the suit. *R. 1 Sid. 463. 1 Lev. 292.*

Or, sue there upon the same of incontinency, when there was no such fame. *R. Gro. Car. 291.*

Or, maliciously procure a false presentment there. *Dub. 2 Cro. 356.*

If he sue in the spiritual court where it appears by the libel that the court has no jurisdiction. *R. 2 Cro. 134.*

So, if he sue in an inferior court, knowing that the cause of action arose out of the jurisdiction. *Lut. 1571. 1566, 1567. R. Skin. 131. Vide post. (E. 1.)*

Otherwise, if it be not alledged, that the plaintiff knew it. *Lut. 935, 937, 1566, 1567.*

So, if he lay his action in a county, where he knows the defendant does not inhabit, with intent to outlaw him. *R. 1 Rol. 103. l. 15. Lane 50.*

If he alledge damages to 500*l.* where he has not cause of action for more than 40*l.* with intent to oust the party of bail. *R. 3 Lev. 211. Lut. 1572. 1 Sal. 14, 15. R. 1 Sid. 424. 1 Mod. 4. Vide post. (A. 10.)*

But an attachment does not lie for this, as a contempt to the court. *R. 2 Mod. Ca. 227.*

So, if a man exhibit false articles to a master in Chancery against *A.* upon which he is bound to his good behaviour. *R. 1 Rol. 33. l. 30.*

If he sue for tithes in the spiritual court when he had made a composition. *Hob. 205, 6. Vide post. (E. 1.)*

So, if a man cause another to be arrested *malitiose* without cause. *Dub. 3 Lev. 210, Semb. Lut. 68. Per Hob. 267. Per Pemb. 2 Mod. 52. Semb. Per C. B. H. 8. Ann. inter Bird and Line, (reported Comyns's Reports 190, 193. (cont. 1 Sal. 14. Vide post. (E. 1.)*

But it does not lie before the original action is determined. *R. in C. B. H. 8. Ann. inter Bird and Line, (reported in Comyns's Reports 190, 193.) D. 1 Sal. 15.*

So, if a man join any one in a suit by collusion; as, if a man sue two as executors, and one of them is not an executor, and he confesses the action, the true executor shall have deceit, and recover so much in damages. *F. N. B. 98. H. (a).*

So, if a man imbeizl a writ, deceit lies against him. *F. N. B. 98. E.*

(a) In this case it would be better to move the court to set aside the judgment with costs. *1 Morgan's Vade Mecq.*

Or,

ACTION upon the Case for a Deceit.

Or, procure another to imbezil it, if it be imbezilled. *M. N. B. 98. E.*

(A. 5.) For Deceit in his Trust.

So, if a man being entrusted in his profession, deceive him who intrusted him; as if a man retained of counsel, become afterwards of counsel with the other party in the same cause. *1 Rol. 91. l. 34.*

Or, discover the evidence, or secrets of the cause.

Or, being retained to attend at such a day at *Guildhall*, does not come; whereby the cause is lost. *1 Rol. 91. l. 36.*

So, if an attorney act *deceptive* to the prejudice of his client; as, if by collusion with the demandant he make default in a real action; whereby the land is lost. *F. N. B. 96. D. 1 Rol. 95. l. 40. Reg. 113. a.*

So, if he appear without warrant, and make default by collusion. *F. N. B. 96. E. Reg. 113. a.*

Or, file a writ of seisin with the sheriff, when there was no judgment; whereby his client is ousted of his land. *1 Rol. 93. l. 2.*

So, if the servant of a merchant put goods upon land before the customs paid; whereby they are forfeited. *R. 1 Rol. 105. l. 40. 2 Cro. 265.*

If a shepherd procure sheep committed to his care to be seized as estrays. *R. 1 Rol. 101. l. 10. Al. 3.*

(A. 6.) In his Office.

So, if an officer, being intrusted by the law, act *deceptive* in his office; as if a sheriff return the tenant summoned by which he loses the land, when he was not summoned: the tenant shall have deceit, and be restored to the land. *F. N. B. 97. C. D.*

And, the tenant shall have deceit after judgment for the demandant before his entry; otherwise he may delay his entry; till the viewers and summoners are dead: but, whether he was summoned or not, cannot be tried but by examination of the viewers, summoners, and perners. *F. N. B. 97. C.*

And, if the demandant makes a feoffment, deceit lies against him, his feoffees and the sheriff. *F. N. B. 97. C.*

And if the demandant, and sheriff are dead, it lies against the heir of the demandant, *F. N. B. 97. C.*

So, in an execution upon a recognizance, if the sheriff return the defendant summoned, when he was not summoned, by which the plaintiff has execution; the defendant shall have deceit against the plaintiff, and the sheriff, and shall have restitution; and the sheriff shall be punished for his falsity. *F. N. B. 97. D.*

So, if the plaintiff recover in waste, where the defendant was not summoned. *F. N. B. 98. B.*

So,

So, if husband and wife lose by default, the land of the wife, deceit lies for them; or for the wife after the death of her husband. *F. N. B.* 98. *C.* 99. *B.*

So, if a plaintiff in a *quare impedit* recover by default, when the defendant was not summoned; he shall have deceit, and thereupon a writ to the bishop. *F. N. B.* 98. *G.*

So, in an annuity, and *scire facias* upon it, if the plaintiff recover by default, when the defendant was not summoned. *F. N. B.* 98. *S.*

So, if a vouchee lose by default, when he was not summoned. *F. N. B.* 98. *A.*

And, if a defendant lose by default, not being summoned, deceit lies; tho' the king was demandant. *F. N. B.* 99. *F.*

So, if the escheator return a writ directed to him, without taking an inquest; though he be an officer of record. *F. N. B.* 100. *C. D. Reg.* 115. *b.*

So, if the under-escheator make a return different from the office found by the escheator. *F. N. B.* 100. *C.* 1 *Rol.* 92. *l.* 20. 9 *H.* 6. 60.

So, if a sheriff act wrongfully in the county court, without the assent of the suitors. 1 *Rol.* 92. *l.* 10.

If bailiffs in *ancient demesne* proceed after the record removed. 1 *Rol.* 92. *l.* 15.

So, if a sheriff make a false return. 1 *Rol.* 92. *l.* 23, 35. 94. *l.* 10. 2 *Inst.* 452.

If an officer of a corporation make a false return upon a *mandamus*. 11 *Co.* 99. *b.*

So, if a sheriff return a juror, who has no issues; by which his successor is charged with the issues. 1 *Rol.* 92. *l.* 30.

Or, commit the return of a pannel to another who has not the return of writs whereby the pannel is quashed. 1 *Rol.* 93. *l.* 5.

So, if a summoner in the Spiritual Court cite any one into the Spiritual Court for vexation, without process against him. 1 *Rol.* 93. *l.* 30.

Or, return any one warned, when he was not; whereby he is excommunicated. *R.* 1 *Rol.* 92. *l.* 45. *D. Mar. pl.* 169. *R.* 2 *Cro.* 351. *R. Mo.* 835. 2 *Bul.* 264.

Vide for misfeasance in an officer, *Action upon the case for misfeasance*, (A. 1.)—For neglect in an officer, *Action upon the case for negligence*, (A. 2.)

(A. 7.) In his Trade.

So, if a man, who professes skill, deceives him who confides in his skill: as, if a smith lame my horse. 1 *Rol.* 91. *l.* 51. 1 *Sand.* 312.

If a farrier take upon him to cure my horse being graveled in his feet, and by his negligence and imprudence kill him. *R.* 1 *Rol.* 91. *l.* 54. 105. *l.* 15.

Or, kill him by bad medicines. • 1 *Rol.* 91. *l.* 45.

So, if a common surgeon maim my hand, by his ignorance in the cure. *Vide* 1 *Rol.* 91. *l.* 47. 105. *l.* 17.

[*A.* breaks his leg, it is set, the callous formed, he can set his foot to the ground and walk with crutches; sends for *B.* an apothecary, to take off the bandage: the apothecary desires *C.* a surgeon to be sent for, who puts an unknown steel instrument on the leg. Afterwards *C.* takes up the leg and nods to *B.* who puts it on his knee; the leg cracks, the callous is broke: action lies against *B.* and *C.* jointly, though both eminent in knowledge and good character. They were trying experiments; that is, acting rashly; and acting rashly is acting ignorantly. *Slater v. Baker, M. 8 G. 3. 2 Will. 359.*]

So, if a taylor have cloth delivered to him to make cloaths, and make them inartificially. *Semb. 1 Vent. 268, 9. Aff. Ent. 12.*

Vide post. (F. 3.)

(A. 8.) In a Sale.

(A. 8.) By false affirmation. So, if a man by a false affirmation of a thing within his knowledge deceive in the sale of goods: as if a taverner sell wine for sound and good, which he knows to be corrupt. *1 Rol. 90. l. 30. 2 Rol. 5.*

Or, give any one to eat corrupt meat; or drink. *1 Rol. 90. l. 35.* for it is ordained, that no one shall sell corrupt victuals, if he knows it. *Kitt. 174. a.*

If a merchant sell cloth, that he knows to be badly fulled. *1 Rol. 90. l. 38. Kitt. 174. a.*

So, if one sell stone for bezoar, when he knows it not to be so. *R. 2 Cro. 469. Vide 2 Cro. 4.*

So, if a man sell goods as his, when they are the goods of a stranger, without an express warranty. *Per two J. cont. 2 Cro. 197. R. acc. 1 Rol. 90. l. 45, 50. R. 2 Cro. 474.*

So, if the seller say, that they are the goods of *A.* which he has authority to sell, when they are the goods of another; tho' it is not averred, that he knew them to be the goods of a stranger. *R. 1650. 1 Rol. 91. l. 5.*

So, if he sell an horse affirming him to have been his horse from a colt, when he was not. *R. 1 Rol. 91. l. 10.*

If he sell a stone or jewels, affirming them to be good, when they are not. *Cont. without warranty, but And. acc. 2 Cro. 4. Semb. acc. 2 Cro. 469. Per Poph. Dy. 75. a. in marg.*

So, if he sell land, affirming the rent to be so much, when it is not; for the rent is certain, and lies within his own knowledge. *R. 1 Sid. 146. 1 Lev. 102. R. 1 Sal. 211.*

If he sell land, affirming that he had a good title, when he knew he had no title. *R. Mo. 126.*

If he sell tithes, knowing that he had no right to them. *R. Mo. 467.*

And, where the seller has the possession of goods, the bare affirmation that they are his, is sufficient to have an action of deceit, if they are not. *R. 1 Sal. 210. R. 3 Mod. 261. Sho. 68. Carth. 90.*

And

And in these cases, the action lies before the goods are taken by the owner. *R. 2 Cro. 474.*

And, tho' the money is not paid for them. *R. 9 H. 7. 21. b.*

(A. 9.) Or other Falsity.

So, if a man contract to enfeoff *A.* of such land; and afterwards enfeoff another. *F. N. B. 98. F. 1 Rol. 101. l. 35.*

Or, before feoffment to *A.* acknowledge a statute, &c. or make other incumbrance.

So, if a man enfeoff another, upon condition to re-enfeoff him, who before acknowledges a statute, &c. *1 Rol. 101. l. 32.*

So, if a woman give a man *blanda verba equipollentia* to a promise of marriage; whereby she obtains of him presents and other services. *R. Cro. El. 79.*

If a man, being married, pretend himself single, and inveigle another to marriage. *R. Skin. 119.*

So, if a clothier sell bad cloths, upon which he put the mark of another, who made good cloths. *R. 2 Cro. 471.*

(A. 10.) For a false Affirmation upon other Occasions.

So, if a man by a false affirmation of a thing within his knowledge procure a fact to be done, which otherwise would not be done: as, if *A.* send his servant to buy an horse, who buys it and pays for it, and the seller affirms to *A.* that he was not paid, whereby *A.* pays him. *R. 1 Rol. 106. l. 20.*

If a man affirm himself of full age, when he is an infant; and thereby procure money to be lent to him upon mortgage. *1 Sid. 183.*

If a man affirm, that a defendant arrested at his suit, owes him 5,000*l.* when he does not; whereby he lies in prison for want of bail. *R. 1 Sid. 424. Per Twissd. 1 Sid. 463.*

(A. 11.) For a false Warranty.

So deceit lies, when upon a sale a man warrants that, which afterwards appears to be false: as, if he warrant the cloth sold to be of such a length. *F. N. B. 98. K. R. 11 Ed. 4. 6.*

If he warrant an horse to be sound. *1 Rol. 96. l. 20, 97. l. 15.*

Or, a ton of wine. *1 Rol. 96. l. 15.*

Or, wool to be merchandizable, when it is full of moths. *1 Rol. 96. l. 40.*

So, if a common carrier of cattle over the *Humber* warrant the carriage of an horse safely; and he perishes by the boat's being overloaded with other horses. *1 Rol. 96. l. 47.*

So, if a man warrant a bale to be only of 800*lb.* weight, which is of 2,000*lb.* whereby the carrier loses his horses by the excess of weight. *R. 1 Rol. 97. l. 5.*

If

[*A.* breaks his leg, it is set, the callous formed, he can set his foot to the ground and walk with crutches; sends for *B.* an apothecary, to take off the bandage: the apothecary desires *C.* a surgeon to be sent for, who puts an unknown steel instrument on the leg. Afterwards *C.* takes up the leg and nods to *B.* who puts it on his knee; the leg cracks, the callous is broke: action lies against *B.* and *C.* jointly, though both eminent in knowledge and good character. They were trying experiments; that is, acting rashly; and acting rashly is acting ignorantly. *Slater v. Baker, M. 8 G. 3. 2 Wilf. 359.*]

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If

If he warrant rent to be so much, when it is not. *R. 1 Sid. 146.*

Or, land to be of such a value, when it is not. *Telv. 20.*

And the action lies, though the warranty be by *parol*. *F. N. B. 98. K.*

And saying, that the goods are his, is sufficient, where the seller has the possession. *R. 1 Sal. 210.*

But, where the seller has not the possession, there must be an express warranty, that he has the property of the goods. *Ibid.*

So, a warranty of land must be express, whether the seller be in possession or not. *Ibid.*

Though the warranty extend to a future time. *F. N. B.*

As, if a man warrant, that a ship shall return safe. *R. 1 Rol. 97. l. 27.*

That *A.* shall live for a year; tho' it is uncertain, and not in his power. *R. 1 Rol. 97. l. 30.*

That sheep are found and will continue so for a year. *Per two J. 1 Rol. 97. l. 25.*

Though the illness was secret and not known to the seller. *Semb. Dy. 75. a. in marg.*

So, if the malady by possibility was not visible; as, if a man warrant an horse to be found, (wind and limb,) and he had but one eye; for that perhaps was not discerned, and it shall be intended that it was not, when the jury find *quod warrantizavit*. *R. 1 Sal. 211.*

But, the words of a warranty shall have a reasonable construction; as, if a man take sheep to depasture, and warrant that he will keep them found in his land; that shall be intended, that his pasture shall not infect them; but an action does not lie, if they were unsound at the time of the warranty. *R. 1 Rol. 97. l. 35.*

The warranty must be made upon the bargain, and at the time of the bargain; otherwise it is not good, without deed. *F. N. B. 98. K. R. 2 Cro. 630. Vide post. (F. 3.)*

And therefore, if a man affirm himself owner, and sell seven days afterwards; deceit does not lie upon this affirmance. *Semb. 2 Cro. 197.*

[So if *A.* offers a sword to sale to *B.* with warranty that the hilt is silver, refuses the money offered, and goes away, then returns and sells it to *B.* for less money without warranty, the first warranty will not extend to this sale. *Anon. H. 7 G. Str. 414.*]

If he sell goods to be delivered afterwards, and at the time of the delivery warrant them to be good, the warranty is void. *Dy. 76. a.*

So, it must be made by him who sells; and therefore, if a servant, or apprentice, upon a sale of goods for his master warrant them, it will be a void warranty; for it is the sale of the master. *2 Rol. 270. (a)*

(a) See in 1 *Morg. Vad. Mec.* 177, a good remark, doubting the law in this case.

Yet, if a man warrant an horse to be found before sale, upon which the other buys him ; an action lies ; for the warranty was the cause of the buying. *Adm. 1 Rol. 96. l. 5.*

Or, before the money paid ; for that compleats the bargain. *R. 1 Sal. 211.*

So, a warranty to do a thing *in futuro* does not bind without deed ; for it sounds in covenant ; as, if a man warrant, that he will purchase such a manor ; an action does not lie, if he do not. *1 Rol. 96. l. 37.*

Or, if a counsel warrant, that he will gain such a cause, and do not. *1 Rol. 96. l. 32.*

Or, if a man warrant, that such seed will grow. *11 Ed. 4. 6.*

That an horse will carry him ten miles in two hours. *Kit. 174. b. 11 Ed. 4. 6.*

So, a warranty does not bind, when it is apparently false in the view, or knowledge of the vendee : as, if a man warrant a horse apparently blind to be found, and the vendee sees him. *Kit. 174. a. 2 Rol. 5.*

Or, warrant cloth to be murrey, when it is blue, and the vendee sees it. *Kit. 174. b. 11 Ed. 4. 6. b.*

But, if a man sell an horse, that has a false or counterfeit eye, an action lies. *2 Rol. 5.*

(B) Against whom it lies.

DECEIPT shall be brought against all the parties to the deceit.

As, if a sheriff return the tenant summoned, when he was not summoned ; whereby the demandant recovers by default ; it shall be brought against the demandant and the sheriff. *F. N. B. 97. C.*

And if the demandant afterwards enfeoff *A.* it shall be brought against the demandant, feoffee, and sheriff. *Ibid.*

And, if the demandant die, it shall be brought against his heir. *F. N. B. 97. C.*

So, if one of the coroners sees the party, and they all return, *non est inventus* ; an action upon the case lies against them all for a false return. *Semb. 2 Mod. 23.*

So, if one of the coroners permit an escape. *Dub.* if the other knows nothing of it, nor joins in the return. *3 Lev. 399.*

So, if an attorney file an *habere facias possessionem* with the sheriff, when there is no record of it ; it shall be brought against the attorney and the sheriff. *F. N. B. 98. O.*

If a man act only as servant, the action shall be brought against his master : as if the servant of a taverner sell corrupted wine ; tho' his master do not command him to sell it to such particular person. *1 Rol. 95. l. 15.*

Tho' the servant knew it to be corrupted ; for he did it only as a servant. *1 Rol. 95. l. 20.*

So,

So, where a servant in any case sells by the command and covin of his master; for it is the sale of the master. *1 Rol. 95. l. 10.*

If a servant of a goldsmith, by order of his master, sell plate, or jewels for good, which are false. *R. 2 Cro. 471. 2 Rol. 5. 26.*

So, in all cases, where a servant acts in execution of an authority given by his master, the master shall be charged by his act. *R. 1 Sal. 282. 2 Sal. 440.*

If a factor sell one sort of goods for another, the merchant shall be charged. *R. 1 Sal. 289.*

So, if a bailiff permit an escape, an action lies against the sheriff. *1 Rol. 94. l. 30. 1 Sal. 18.*

So, if an under-sheriff make a *mandavi ballivo* to one, who has no return; whereby the pannel is quashed. *1 Rol. 94. l. 25.*

Or, if the sheriff take upon him to return the answer of an old bailiff of a franchise after his removal, which is false. *R. 1 Rol. 99. l. 35.*

But, if a servant is guilty of a deceit without the covin of his master, an action lies against the servant; for it is a personal wrong, and falsity: as, if a servant, who is my merchant, sell false merchandize in a fair of his own head; for the master does not command him to sell to any one in particular. *9 H. 6. 53. b. R. Bridg. 127. 1 Rol. 95. l. 5.*

[It lies against the master for a fraud of the servant in his trade, tho' the master was ignorant of it. *Grammar v. Nixon. M. 11 G. Str. 653.*]

If an under-sheriff imbezil a writ, an action lies against him. *Semb. 1 Rol. 94. l. 20.*

Or, upon a writ delivered to him make a summons; and do not return the writ; for perhaps the sheriff had not notice of it. *R. 1 Rol. 94. l. 35. 1 Leo. 146. Cro. El. 175.*

If an under-bailiff upon a warrant levy the debt, and afterwards conceals the writ. *R. 1 Rol. 94. l. 45.*

If an under-sheriff suffer an escape, the party may charge him, if he will. *R. 1 Leo. 146.*

If the under-steward of an inferior court proceed after an *habeas corpus* delivered. *R. 3 Leo. 99.*

If the servant of a post-master steal goods delivered to him to be carried by the post. *Sal. 441.*

If a servant act contrary to the direction of his master, and his master disagree to it. *R. Sal. 442.*

So, if a servant make an expresse warranty: as, if a servant lease land for his master, reserving the rent to his master, and to invite the lessee to take the lease, promise that he shall enjoy it without incumbrance; if the land be incumbered, an action may be against the servant. *R. 1 Rol. 95. l. 30.*

So, if a gaoler permit a voluntary escape, an action lies against him; tho' not for a negligent escape. *Sal. 18.*

If a servant directed by a goldsmith, his master, to sell a false jewel to the king of *Barbary*, procure *A.* without the privity of his

his master to sell it, who was afterwards imprisoned till he refunded the money paid, *A.* shall not have an action against the master. *R. 2 Rol. 5, 26. 2 Cro. 468.*

(C) By whom it lies.

IF a man lose by default in a *præcipe quod reddat*, his heir after his death may have deceit. *F. N. B. 98. 2.*

So, if there be execution by default upon a recognizance, and the defendant die, his executors shall have deceit, and shall be restored. *F. N. B. 98. R.*

If tenant for term of life, or in fee in *ancient demesne*, levy a fine at common law, the lord being only tenant for life shall have deceit to annul the fine. *F. N. B. 99. E.*

And, after his death, he in the reversion. *Ibid.*

But he in the reversion shall not have deceit, if the tenant for life lose by default. *Ibid.*

So, if a man apply bad medicines, to the maiming of a servant, the master shall have an action; for he has a prejudice by the loss of his service. *R. 1 Rol. 98. l. 15.*

So, if a servant be cozened of his master's money, the master shall have the action. *R. 1 Rol. 98. l. 12.*

(D) At what Time it lies.

IF there be judgment against the tenant by default, who was not summoned, deceit lies before the entry of the demandant; otherwise he may delay his entry, until the summoners and viewers are dead. *F. N. B. 97. C.*

So, if *A.* sell goods as his, when they are not, deceit lies before the owner seizes the goods; for if he wait till an interruption by the owner, the party may be dead. *R. 1 Rol. 98. D.*

If a man make a sale with warranty, an action lies before the money paid; for the defendant may have debt for his money. *Kit. 174. b. Vide 1 Sal. 211.*

Vide ante, (A. 4.)

(E) When Deceit does not lie.

(E. 1.) For a judicial Act.

Vide ante, (A. 4.)

BUT deceit does not lie against him, who acts judicially; altho' he prejudices another: as, if a judge of record give a false judgment. *1 Rol. 92. l. 7.*

If the sheriff, with the assent of the suitors, quash an essoin erroneously. *1 Rol. 92. l. 10.*

If a sheriff has a court by prescription, and executes process, an action does not lie for any thing that he does there. *R. 1 Rol. 29. l. 25.*

Nor against him, who sues in a proper court without cause: as, if one sue in the spiritual court for tithes, after payment. *R. Cro. El. 836. Vide Hob. 205, 6. Vide ante (A. 4.)*

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R

Nor,

ACTION upon the Case for a Deceit.

Nor, for titthes of grofs trees. *R. 2 Cro. 134. Hob. 205. & marg. Per Hale, Hard. 196.*

If he sue in an inferior court, without any cause of action within the jurisdiction. *Lut. 1570. Semb. Sho. 254. 4 Mod. 13. Vide ante, (A. 4.)*

(E. 2.) For a prejudice without a Trust.

Nor against him, who is not specially intrusted, nor professes skill; tho' he does a prejudice: as if a man not retained, discover the evidence shewn to him. *1 Rol. 91. l. 40.*

Or, afterwards become of counsel with the other party. *Ibid.* If a man not professing the cure, kill an horse by bad medicine. *1 Rol. 91. l. 45.*

Or, maim the hand of another by ignorance in the cure. *1 Rol. 91. l. 47.*

(E. 3.) For an unsuccessful Endeavour in his Trust, &c.

Nor against a man intrusted, if he does his endeavour; tho' he do not succeed: as, an action does not lie against the counsel retained in such a cause, if he does his duty, tho' he do not prevail. *1 Rol. 91. l. 30.*

Nor, against a surgeon, who uses his diligence; tho' he do not cure. *1 Rol. 105. l. 20.*

Nor, does it lie against a man intrusted, for the neglect of a thing, which he was not bound to do: as, if an attorney make default at *Nisi Prius*; for he was not bound to go to *Nisi Prius*. *1 Rol. 95. l. 47.*

So, if consuance be demanded by a franchise, and he make default there; for tho' he remains attorney, he is not bound to go thither. *1 Rol. 95. l. 45. (a).*

(E. 4.) For a Falshy, without Warranty.

Nor, does it lie against him, who sells without warranty, if the thing sold had a visible malady, which the vendee had an opportunity of discovering: as, if a man sell a horse, that he knew to be lame, or that had splint, spavin, &c. which the vendee might perceive by inspection. *Kitt. 174.*

So, if a man sell corrupted wine, if the vendee or his servant taste, and approve of it. *Kitt. 174. (b)*

If he sell land, to which he had not a good title; when he does not offer it to sale, but the other proffers himself to be a purchaser. *Per Gawdy, Mo. 126.*

(a) It is apprehended that the two last cases are not proper applications of the principle; it is certainly the duty of the attorney to attend.

(b) Note; Now that the art of *brewing wine* is arrived to such perfection, as that even tolerable judges cannot distinguish, by the taste, the manufactured from the real; and there may be ingredients in the composition, destructive to the health, which are not perceptible to the taste; it seems reasonable that an action should be maintained upon due proof. *1 Mart. Fed. Dec. 184.*

So, if the malady be internal, and not visible to the vendee : as, if a man sell a horse sick in his body. *Cont. 20 H. 635. Semb. acc. 1 Rol. 90. l. 41.*

Nor, does it lie, tho' the vendor affirm falsely of the value : as, if he affirm, that land, or jewels, are of so much value, when they are not. *R. 1 Sid. 146. 1 Cro. 102. R. Yel. 20.*

So, if he affirm falsely of his right, when another has the possession : as, if a parson say, that he is incumbent, and has a right to sell the tithes, and upon that sells them ; when he was not incumbent. *R. Per two J. 2 Cro. 197.*

So, if he affirm, that he was offered so much by A. for the thing sold ; when he was not. *R. 1 Rol. 101. l. 40. 1 Sid. 146.*

So, if he knew not the defect at the time of the sale, an action does not lie. So, if the vendor affirm, and sell an horse for his own goods, if he did not know the contrary. *R. Al. 91.*

If he affirm a stone sold by him to be bezoar, when it was not ; for perhaps he did not know it. *R. cont. in B. R. but the judgment was reversed. 2 Cro. 4. 2 Rol. 5. (a)*

(E. 5.) When there is another Remedy.

Nor, does it lie for a falsity, when the party may avoid it by plea : as if a man counterfeit my name to a bond ; for I may plead, *non est factum*. *1 Rol. 100. l. 10.*

If a man sue for tithes in the spiritual court, and when the defendant had two witnesses to prove payment, discontinues, and after the death of one of the witnesses, sues again. *R. 1 Rol. 102. l. 2. Cro. El. 836.* for the defendant may have a prohibition.

So, if a man after the payment of a debt, and a release given, be taken in execution again ; for he may have an *audita querela*. *R. 1 Rol. 102. l. 15. (b)*

So, if a man be taken up by erroneous process ; for he may be aided by writ of error. *R. 1 Rol. 102. l. 25.*

Otherwise, when he cannot take advantage by writ of error. *R. 7 Co. 4. b.*

So, if a bailiff make a false *affidavit* upon an arrest ; whereby A. is committed to prison. *R. 1 Rol. 33. l. 35.* for he may be indicted for perjury.

(a) Note ; In several of these cases, the meaning must be that an action of *Deceit* will not lie, for surely if there be a warranty, altho' the seller did not know of the defect, an action lies upon his warranty. The true distinction seems to be, that where the deceit may easily appear to the vendee, who depends on his own judgment, an action will not lie ; and that where the deceit is not easily perceived, and can be discovered only by connoisseurs, and is such that the generality of mankind, cannot, on contracting for the commodity, find out, an action will lie. *1 Morg. Vad. Mec. 185.*

(b) An *audita querela* is now very seldom used, the court in most instances relieving the party on motion : in the present case the best mode would be to pay the money into the hands of the sheriff, giving him notice to retain it, and then move the court that the money be returned to the defendant, and that the plaintiff may pay the costs of the application. *1 Morg. Vad. Mec. 186.*

So, if an executor, pending an action against him, make a fraudulent sale of his goods; for it will be a *devastavit*. *Dub.* 2 *Rol.* 292, 3.

(F) The Proceeding in an Action for a Deceit.

(F. 1.) The Original.

AN action for a deceit shall be sued by original out of the Chancery. *F. N. B.* 99 *G.*

And the writ is without *vi et armis*; as in other actions upon the case. *F. N. B.* 92. *E.* 95. *E.*

And, if the deceit be to the court, the writ shall be *ad respondendum tam regi quam parti*. *F. N. B.* 95. *E.* *Reg.* 112. *a.* 113. *b.* 116. *a.*

And the process in a writ of deceit is attachment, and distress. *F. N. B.* 100. *D.*

But sometimes the party may sue by original, or by a writ judicial out of the court, where the deceit was committed, at his election: as if the tenant lose by default, not being summoned, he shall sue by original, or by writ out of *C. B.* at his pleasure. *F. N. B.* 99. *G.*

So, in a *scire facias* upon a recognizance, if the plaintiff has execution by the default of the defendant, who was not summoned, the defendant shall sue by original, or by writ out of *B. R.* or *C. B.* *F. N. B.* 99. *H.*

And sometimes a writ of deceit shall be in nature of an *audita querela*. *F. N. B.* 99. *I.*

As, if the demandant and his attorney file a warrant of attorney for the defendant, who was essoined; whereby the essoin is quashed, and the tenant loses by default. *F. N. B.* 99. *I.* *Reg.* 114. *a.*

Or, if a man acknowledge a statute in the name of another. *Reg.* 114. *b.*

Or, sue a *præcipe in capite* upon a false suggestion. *Reg.* 114, 115.

(F. 2.) The Declaration.

(F. 2.)
Must be
laid in the
proper
county.

Deceit shall be brought in the county, where the deceit is supposed to be done. *F. N. B.* 98. *L.* *Vide Action*, (N. 5.)

And, the venue shall not be changed. *Vide Action*, (N. 13.)
(a)

(F. 3.)
With a sci-
enter, &c.

The declaration regularly ought to charge, that the defendant was *sciens* of the matter, by which he deceived.

And, that he did it *falso et fraudulenter*.

(a) Note; In an action on the case in the nature of a deceit, were the plaintiff to declare not in the proper county, the court would on motion, on the common *affidavit*, change the venue. 1 *Morg. Vad. Mes.* 187.

It ought regularly to shew, in what the deceit consisted : as, if it be for requiring extravagant bail it ought to shew how much the debt was, what process was sued, and what bail demanded.

R. 1 Sal. 15.

But it may be supplied by matter tantamount : and therefore, if the plaintiff declare, that the defendant *improvidè et incautè absque consideratione loci* drove his horses upon the plaintiff, it is well : tho' he do not alledge, that he knew the horses to be unruly. R. 2 Lev. 172.

So, if he alledge, that the defendant did it *falsè et fraudulenter*, that imports, that he was *sciens*, after verdict. Dan. 178.

So, *scienter* supplies the omission of *falsè et fraudulenter*, after verdict. R. 1 Sid. 146.

And, if he alledge, that the defendant was *sciens* of the defect, there is no necessity for a more express averment, that there was such a defect. R. Mo. 46. Dan. 178.

So, if *scienter*, and *falsè et fraudulenter* are omitted, it is good, after verdict. R. 3 Mod. 261.

If the plaintiff declare upon a warranty, he must say, *warrantizando vendidit* ; whereby it may appear to the court, that the warranty was at the time of the sale. Per two J. 2 Cro. 630. Vide ante, (A. 11.)

If he declare of a deceit by one, who professed skill, as of a taylor for inartificially making his cloaths, he must shew, that he delivered materials to him for the making of them. R. 1 Vent. 269.

So, he must shew the particular defects. R. 1 Vent. 269.

(F. 4.) The Plea.

To an action for deceit the defendant shall plead generally. Not Guilty. Pal. 393.

Vide in Pleader, (2 H.)

Vide more of Deceit, in *Covin.*—*Fraud.*—*Justices of Peace.* (B. 30, &c.)—*Leet*, (L. 6, &c.)—*Parliament*, (L. 38.)

ACTION upon the Case for Defamation.

(A) When an Action for Defamation lies.

AN action upon the case lies for defamation, if a man defame another by slanderous words.

Or, if by any means he publish slander of another ; as, if a minister in his pulpit pronounce a man to be excommunicated, when he was not. 1 Rol. 37. l. 5.

If a man by letter write slander of another, to a third person. 1 And. 119.

If he insert slander of him in an *affidavit*, foreign to the matter of the *affidavit*. Dub. 3 Mod. 108.

(B)

(B) De Scandalis Magnatum.

(B. 1.) For whom it lies.

Vide Libell.
(C. 5.)

By the *stat. 2 R. 2. 5.* confirmed by the *stat. 12 R. 2. 11.* none shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles, and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or the other, and other great officers of the realm; and he that doeth shall incur the pain of *stat. W. 1.*

Any great man, or officer of the realm, shall have an action *tam pro rege quam pro seipso* upon the *stat. 2 R. 2. 5.* if words are spoken to the slander of him. *4 Co. 13. a. Cromwell. R. 2 Mod. 152, 159. 1 Rob. 78. Vide Vid. Ent. 72, 74. Vide Action upon Statute, (E. 2.)*

So, a viscount may have it; tho' this dignity was created since the statute. *R. Cro. Car. 136. Ley 82. Pal. 565.*

So, a baron of the *exchequer*; tho' the statute mention only justices of the one bench or the other. *Per Crew, Pal. 565. Semb. 12 Co. 134.*

But an action upon the *stat. 2 R. 2. 5.* does not lie for words to the slander of the king; but they shall be punished by the *stat. W. 1. 34. 2 Inst. 228. 12 Co. 133, 134.*

So, it does not lie for a peer; if he was not so at the time of the speaking. *Pal. 566.*

(B. 2.) For what Words.

Scandalum magnatum lies if a man speak against them any words, which are actionable when spoken against a common person.

So, tho' the words are not so certain, as to maintain an action against a common person; yet if they sound in slander, *scandalum magnatum* lies; as, if a man say, *My lord P. sent after me to take my purse*: tho' he do not say, *feloniously*. *R. 1 Lev. 277. 1 Sid. 434. R. 1 Vent. 60.*

My lord P. is an unworthy man, and acts against law and reason. *R. per three J. Atkins cont. 2 Mod. 150, 167. 1 Mod. 233.*

My lord has no more conscience than a dog. *3 Bul. 226. Dan. 165.*

My lord is no more to be valued than a dog. *2 Mod. 260. 1 Lev. 148.*

If a man speak of a bishop, *You writ a letter which is against the word of God, the queen's authority, and to the maintenance of superstition.* *R. Cro. El. 1.*

My lord imprisoned me, till I made him a release. *R. 1 Leo. 336.*

My lord A. sent for us, and put some in the stocks, and me in a place called Little Ease. *1 Leo. 336.*

If he speak of a bishop, *he is a Papist.* *Ibid.*

He is a wicked man. *D. 2 Mod. 160. Vide infra.*

My lord bid me compound the robbery. 2 Mod. 164. R. Cro. El. 68.

My lord cares not how he comes by goods. 2 Mod. 164.

I met A. whom I do not know, but my lord sent after me to take my purse. R. 1 Lev. 277. 1 Vent. 59. 1 Sid. 434.

I have learnt your unchristian dealing to take my good name, life, land, goods, &c. R. 1 And. 121.

He is a base earl, and a paltry lord, and keeps none but rogues and rascals like himself. Semb. 2 Cro. 196.

So, it lies for words in the course of a judicial proceeding, where the court has not jurisdiction. 2 Inst. 228. *Vide post.* (F. 22.) *Vide Action upon the Case for a Conspiracy.* (B.)

But an action upon the stat. 2 R. 2. 5. does not lie for a judicial proceeding against a peer by action, appeal, indictment, &c. tho' he be acquitted. 2 Inst. 228. Hob. 226. R. Kel. 26, 27. Dy. 285. a.

So, it does not lie, where the words do not import slander; as, if a man say, the earl's men by his command took goods by a forged warrant; for if he did not know it to be forged it is no offence. Dan. 165.

If a man say of an archbishop, *he is a covetous malicious bishop.* R. Mo. 38.

If A. say, that a Peer, being a subject, ought to obey the king's order; to which B. answers, *that is his grief.* Poph. 67.

(B. 3.) How the Proceeding shall be.

If in the declaration the statute be misrecited in a material point, it is bad. R. 4 Co. 12. b. Pal. 565. *Vide Cro. Car.* 136.

As, *nuncia*, for *mendacia*. 4 Co. 12. b. *Vide Action upon Statute.* (I.)

But, the declaration need not recite the statute at large. *Vid. Ent.* 74. *Vide Action upon Statute.* (H.)

So, if it say, *debates*, for *slander*, it is not a material variance. *Cro. Car.* 135.

Nor, if it say, *discordia inter magnates et communitatem*, for, *discordia infra hoc regnum.* R. Cro. Car. 135, 6.

Nor, misrecite the preamble, or a part, that does not vary the offence. R. Ley. 82. Pal. 565.

Nor say, *mendacia*, for *scandalum.* Jon. 194.

Incendia domorum, where the stat. says, *incendia* only. 2 Mod. 99.

If it say, *contrafaciat mendacia*, for *devise lies.* 2 Mod. 98.

If it omit, (and other) great men, &c. Ibid.

(C) To the Slander of a Title.

(C. 1.) When it lies.

SO an action upon the case lies for slander of a title; as, if a man intending to sell land, another says, *that he has a lease of it for ninety-nine years.* Semb. Cro. El. 197. 2 Cro. 163.

Or,

Or, *that A. has a rent-charge out of the land; whereby the owner cannot sell it.* Cro. El. 197.

I know one, who hath two leases of this land, which he will not part with. R. Cro. El. 427.

It is troubled with more incumbrances than it is worth. 2 Leo. 112.

Think you the land is his? It is a compact between his brother and him. R. 2 Leo. 111, 112.

B. forged a deed to cheat me of my estate, and gave A. 40s. for ingrossing it. R. Ray, 4. 1 Sid. 16.

So, if a man say, *B.'s land is lawfully assured to C.* tho' C. has a void limitation of it, which might give a colour for the words; for he takes upon him the knowledge of the law. R. 1 Co. 177.

So, if a man, knowing *A.* to be in communication for selling his estate, publish a lease, which he himself has, and which he knows to be counterfeit, for a good lease. R. 4 Co. 18. b. Vide Dan. 164. Vide Cro. El. 197. 2 Cro. 163.

So if he speak of a lease as subsisting, without mentioning of his title to it. R. 2 Cro. 164.

So an action upon the case lies for slander of a title, when the words are spoken to a stranger, and not to him who intended to purchase. R. 2 Leo. 112. Dan. 164.

So an action upon the case lies for the slander of a title, tho' the party has a remedy against him who wrongfully disturbed his possession. Per Hale, Al. 3.

(C. 2.) When not.

[But it lies not if there is not malice express or implied: or if the words do not go to defeat plaintiff's title; or if spoken to protect defendant's property, or to prevent another's being cheated: nor against attorney delivering such message, tho' he varies in immaterial circumstances. *Hargrave v. Lebreton.* P. 9 G. 3. 4 B. M. 2422.]

So, if a man say, *that he himself has a title to the land*, tho' it be false, an action upon the case does not lie for the slander. R. 4 Co. 18. a. Per two J. 1 Rol. 409. Cro. El. 197. R. Cro. El. 427. 1 Sal. 14.

And, tho' it appears by the bar of the defendant himself, that he has no title; for a bar shall not make a count, insufficient to maintain the action, to be a good one. R. 4 Co. 18. b.

So, if a man say, *I know one who hath title*, he may justify by shewing, that he himself has title. Per two J. Popph. cont. Mo. 410.

So, if the words themselves appear not to impeach the title, an action upon the case does not lie; as, if the plaintiff declare, that *A.* by fine settled land to himself for life, remainder to the first son then after to be begotten in tail, remainder to the plaintiff, and that the defendant after the death of *A.* in slander of his remainder said, *that B. is the lawful son of A. begotten after his marriage, ubi revera he is not so*; an action upon the case does not

not lie, for if he was his son after marriage, unless he was born after the fine levied, it is no prejudice to the plaintiff's remainder. *R. Dal.* 103.

So, if the words are not a direct slander to the title: as if *A.* had sold land to *B.* who had a mind to sell it to *D.* and a man says to a stranger, *That A. was a bastard*, whereby *D.* did not purchase it; an action does not lie by *B.* *Per Poph. Cro. El.* 346. *Vide post.* (*D.* 11, 12.)

So, if *A.* and his wife were in treaty for the sale of lands in right of his wife to *B.* and another says, *That the wife has another husband.* *Dub. Cro. El.* 346.

He hath no authority to sell. *Per three J. Yel.* 80.

A. shall be brought to inherit that estate. *R. Yel.* 88.

So, if it does not appear, that the plaintiff has a damage, the action does not lie; and therefore, the plaintiff ought to aver, that by the speaking he could not sell, or lease, &c. *R. Cro. El.* 197. *R. Cro. Car.* 140. *R. 2 Cro.* 484.

So, if the plaintiff say only, that he had an intent to sell, without alledging a communication for a sale. *R. 1 Rol.* 244. *2 Cro.* 484.

Or, if he shew only an intent to make a voluntary settlement. *1 Rol.* 244. *Yel.* 89.

So, if the words are spoken by a counsel to his client, who advises with him upon the purchase. *R. Mo.* 187.

Or, by an attorney, with whom he advises upon the purchase. *R. Mo.* 187.

(D) To the Slander of a Common Person.

(D. 1.) Words which endanger his Life.

(D. 1.)
Charge of
treason.
Vide post.
(*F.* 1, 16.)

SO an action upon the case lies for words spoken against a common person, which charge him with treason; as, *Thou art a traitor.* *4 Co.* 17. *b.*

He hath committed treason. *1 Sid.* 53.

Thou art a traitorly knave. *R. 1 Sid.* 103.

He did treason in the Low Countries; for it is triable by *St.* 35 *H.* 8. *R. 1 Rol.* 63. *l.* 45.

I accuse justice Hutton of high treason. *R. Hut.* 131. *Cro. Car.* 504.

He is a traitor, and rebel. *Ray.* 23.

I am no traitor, but have seen thee in rebellion. *R. 1 Sid.* 381.

Thou art a rebel, and all that keep thee company, and no friend to the queen. *R. 1 Rol.* 69. *l.* 16.

He would have taken away the king's life; for the intent is treason. *Semb. Ray.* 20.

Thou hast set thy hand to bring the late king to justice. *R. 1 Sid.* 131.

Thou, and thy crew brought the late king to death. *R. Hard.* 203.

Thou

Thou didst harbour A. the Jesuit, knowing him to be one; without saying, that he was born in England. R. 1 Rol. 69. l. 30. Lut. 1. Jon. 68.

That the plaintiff said, 10 Jac. There is no prince in England; for it shall be taken, that he denied the son of the king to be prince. R. 1 Rol. 69. l. 5. Vide 1 Rol. 444.

He is to be hanged for counterfeiting the king's hand and seal. R. Ray. 17.

Thou art a clipper, and shall be hanged for it; for it shall not be intended a clipper of any thing but money. R. 3 Lev. 166. Skin. 184.

Thou wert burnt in the hand for coining; though he could not have clergy. R. 2 Cro. 536.

Thou art a clipper and thy neck shall pay for it. R. Skin. 183. 3 Lev. 166.

I will hang him, for he hath spoken treason. 2 Cro. 276.

He hath spoken treason, and I will prove it. R. 2 Cro. 275, 6.

(D. 2.) Or, which charge with murder; as, *You poisoned your husband; Of murder. if the husband be dead.* R. 1 Rol. 71. l. 50. 72. l. 5, 20.
Vide post.

(F. 2.)

Thou hast killed A. R. 1 Rol. 72. l. 10. R. 2 Mod. Ca. 24.

Thou didst help to murder A. R. 1 Rol. 72. l. 15.

He hath killed a man; without mentioning any one in particular. R. 1 Rol. 77. l. 30.

He broke his father's ribs of which he died; he may be hanged for the murder. R. 1 Vent. 117.

He killed my wife; without an averment, that she is dead. R. Cro. El. 823.

He dispatched his wife, and will dispatch me too. R. 1 And. 120.

(You did flout up my sister, (plaintiff's wife, defendant's sister) and murder her, and I will prove it. Rivers v. Lite, P. 13 G. 2. Str. 1130.

(D. 3.)
Of other
felony.
By statute.
Vide post.
(F. 3, 17.)

Or, which charge with other felony; as with witchcraft with-
in the St. 1 Jac. 12. As, if a man say, *He is a witch and did bewitch my child.* R. 1 Rol. 44. l. 40.

Though he do not shew any damage consequent. 1 Rol. 44. l. 40. 45. l. 5. 46. l. 5, 50. Cro. El. 571.

He is a witch, and bewitched me. D. 1 Rol. 44. l. 45. Cont. 17 Jac. but R. acc. 8 Car. 1 Rol. 45. l. 20.

He is a witch and bewitched my wife's milk. R. 1 Rol. 45. l. 32.

Or, my mother's drink. R. 1 Rol. 45. l. 35. Cro. Car. 141.

Or, my cattle, mare, &c. R. 1 Rol. 46. l. 25.

Or, He is a strong witch, and bewitched me, and my aunt, there- fore I will not marry him. R. Cro. Car. 474. 480. 1 Rol. 46. l. 5.

She is a witch and was convicted at the assizes. R. 1 Rol. 45. l. 52. Jon. 325.

The devil appears to thee and thou conferrest with him, and what- ever thou askest, he gives thee. R. 1 Rol. 46. l. 30. Mo. 868.

She

She sacrificed her child to the devil, of intent to bewitch A. R. 1 Rol. 44. l. 50.

So, if one say, *Thou art a witch, and shalt suffer for it.* Per three J. Powel cont. 3 Lev. 394.

Or, *Thou art a witch and deserveest to be hanged.* R. 1 Sid. 53. Ray. 35.

Or, *She is a witch, and if she cross me I will hang her for it.* R. 1 Sid. 386. 1 Lev. 255. * But now that the statute of witchcraft is repealed (by the St. 9 G. 2. c. 5.) such words are clearly not actionable: yet words accusing one of *pretending* to witchcraft, &c. it is conceived are actionable, since by the statute of G. 2. such pretence is made punishable by imprisonment and pillory.*

So, if he charge with felony within any other statute; as, if he say, *He hath two wives, and I will hang him.* R. 1 Rol. 76. l. 5.

If he say, *He hath harboured a Jesuit, seminary priest, &c.* R. Lat. 1. Jon. 68. 1 Rol. 69. l. 30, 35.

Tho' he do not say, that he was born in England; which is necessary to make it felony, R. Lat. 2. Jon. 68. 1 Rol. 69. l. 30, 35.

Tho' he do not shew, that the words were spoken before the St. 27 El. 2. for it shall not be intended before, at this time, Lat. 2. Jon. 68. 1 Rol. 69. l. 30, 35, Anno. 1 Car.

So, if he charge with burglary; *He is in the church, robbing the church.* R. 1 Rol. 76. l. 20. (D. 4.)

He is a rogue, and broke open an house. R. Skin. 364. By the common law.

So, if he charge with robbery; as, if he say, *He went to A. house and would have him rob B's house and he did rob him, without saying, who did the robbery.* R. 2 Lev. 205. (F. 4, 17.)

He set on me in the highway, and took my purse; though he did not say, that he robbed him. R. 1 Rol. 74. l. 5. Jon. 302.

He would have given D. money to rob A. and he did rob him, R. 1 Vent. 323.

He lay in wait to rob him, and set on him in the highway. R. Cro. Car. 140.

He set upon me, to rob me. Cro. Car. 140.

He hath picked my pocket of silver and gold. R. 1 Rol. 68. l. 45. Cont. 73. l. 40.

So, if he charge with larceny; *He is a thief, and stole, or (for he stole) my trees, furze, dung, turnips, corn, grass, or other thing of which felony may be committed.* R. 1 Rol. 51. l. 40, 50, 52. l. 5, 10, 15, 20, 70. l. 35. R. 2 Cro. 39, 166. R. cont. Hob. 331. R. acc. 2 Cro. 114. 2 Rol. 440. Jon. 43. Vide Al. 31.

Tho' the charge amounts only to *petit larceny.* R. 1 Rol. 43. l. 40.

As, *He stole my corn out of my barn, without saying the value.* R. 1 Rol. 43. l. 47.

He feloniously stole my corn. 1 Rol. 70. l. 45.

He stole corn from A. 1 Rol. 70. l. 47.

He stole three pecks of corn sent to his mill. R. 1 Rol. 73. l. 25.
He did break open my chest, and steal my deeds, for that is felony.
 R. 1 Rol. 73. l. 30.

He hath stolen my wood. R. 1 Rol. 70. l. 27, 30. Per three J.
 2 cont. 2 Cro. 66. Vide 2 Cro. 166.

He stole my box-wood. R. Mod. Ca. 23. Sal. 695, 6.

Stole lead out of my master's house. R. 1 Lev. 156.

Stole our bees and art a thief. R. Ray. 33.

By a *feme-covert*, *You stole my faggots*; for she may have property, and it is a common way of talking. R. Pal. 358.

So, if one say, *He was a thief, and stole my gold.* R. 2 Cro. 622.

So, if he say, *He is a thief, and stole lead off the house*, which is not felony; the former words are actionable by themselves. R. 2 Cro. 114, 154, 231. *To steal lead is now felony, and consequently the latter words are actionable as well as the former.*

So, if he charge with felony generally; as, *He is a thief.* R. 1 Rol. 42. l. 45.

[*"Thou art a thief"*—*"Of what?"*—*"Of every thing:"* it shall be intended to be of every thing he can be a thief of. *Morgan v. Williams*, H. 5 G. Str. 142.]

Thou art a whore, and a thief. R. 1 Rol. 42. l. 51.

Thou art a whore-thief. R. 1 Rol. 42. l. 49.

I charge thee with felony. R. 1 Rol. 43. l. 5. Cont. 73. l. 50.

He stole the colonel's cloth, without saying, what colonel. R. 3 Mod. 280.

So, an action upon the case lies, *quia crimen felonie imposuit* generally, without saying, *what felony.* 1 Vent. 264.

So, if he accuse one of an attempt which makes him accessory to a felony; as, *He lay in wait to rob, &c.* R. 1 Rol. 50. l. 45, 50. Jon. 195. Cro. Car. 140.

He set them on to rob me. R. 1 Rol. 51. l. 10. Vide Mo. 63.

He persuaded A. to rob me. R. 1 Rol. 51. l. 20. Cro. El. 710.

She attempted to kill. R. 1 Rol. 51. l. 25.

A. stole sheep and R. by compact took a meadow to cloak the felony. R. 1 Rol. 67. l. 45.

Thou didst receive stolen goods, knowing them to be stolen. Cont. for that does not make him accessory, unless he aids felony. 1 Rol. 68. l. 10. Cont. 1 Vent. 18. But now by the Stat. 3 & 4 W. & M. c. 9. such a receiver is an accessory.

He maintains thieves or pirates, &c. against the law and proclamation; tho' he does not say, that he knew them to be pirates; for, *against law*, imports it. R. Cro. El. 52.

A. stole, &c. and thou wer't partner with her. R. 1 Sid. 413. 1 Vent. 18.

He would have robbed me, if A. would consent; he persuaded A. to do it. R. Cro. El. 710. 1 Rol. 51. l. 20.

He writ a letter to A. to desire him to kill his wife. R. Cro. El. 747.

He is a smotherer, and maintainer of felonies. R. 2 Cro. 267. (D. 5.)

(D. 5.) Words, which endanger corporal Punishment.

Or words which charge with a crime, that subjects one to a corporal punishment; as, if he say, *he is perjured*. R. 1 Rol. 39. l. 25. (D. 5.) Charge of perjury. *Vide post.* (D. 7.—F. 5, 18.)

I can prove him perjured. R. 1 Rol. 39. l. 30. 35.

I will prove him perjured by two witnesses; without saying, in what court, or how. R. 1 Rol. 39. l. 40.

She is a perjured whore. R. Hard. 7.

He was perjured in Tottenham Court; for it shall be intended a court sufficient. R. 1 Rol. 39. l. 47.

Or, in the hundred court; for that is within the stat. 5 El. R. 1 Rol. 42. l. 40.

Thou art a perjured knave; for thou swearest at the leet, I bake bread, when I do not. R. Cro. El. 709.

He is forsworn, and took a false oath at T. in his deposition, when he waged his law against me. R. 2 Cro. 204.

He is perjured in A's will; for it shall be construed concerning that will. R. 1 Rol. 39. l. 5.

So, if he charge with subornation of perjury.

As, if he say, *thou hath procured false witnesses to swear in such a cause*. Mod. Ca. 201. Cro. El. 93. (D. 6.) Or, subornation. *Vide post.* (F. 12.)

He suborned A. to forswear himself before the chief justice. R. 2 Rol. 410.

Thou procurest A. to come thirty miles to commit perjury before the bishop of W. and hast given him 10l. for that purpose. R. though the perjury is not alledged to have been committed. 2 Cro. 158.*

*(In 5 Jac. —Vide S. C.

Cont. in 3 Jac. Tel. 72. 1 Rol. 51. l. 5. And Mod. Ca. 201. cites it both ways.)

So, if he say, *that A. was forsworn*, and add such words, as denote him to be perjured; as, if he say, *he was forsworn in the Ecclesiastical Court; for it is a court well known*. R. 1 Rol. 40. l. 6. Cro. El. 185. (D. 7.) Or words that import perjury. *Vide post.* (F. 5, 18.) Ante (D. 5.)

In the court of requests. 1 Rol. 40. l. 50. 69. l. 54. Cro. El. 135.

In the court of the counsel of the marches of Wales. R. 1 Rol. 40. l. 10. Hard. 151. Hob. 283.

In chancery; for it is a court of Record. R. 1 Rol. 40. l. 53. 41. l. 10.

He gave 10l. to B. for forswearing himself in Chancery. R. 1 Rol. 41. l. 20.

He was forsworn in his answer to A's bill in Chancery; if he alledge, that A. exhibited his bill, to which the plaintiff answered, tho' he do not say, in a point material; and it shall not be intended another suit. R. 1 Rol. 42. l. 5. 78. l. 40. Cro. Car. 322.

Forsworn in the Star-Chamber. Cro. El. 135.

He is a forsworn fellow, and banded as honest a man as himself by his false oath. R. Cro. El. 572.

Thou

Thou wer't forsworn in the action at the assises, having discourse of an action, and his testimony there, tho' he do not say, in what particular. R. 1 Rol. 41. l. 25.

At the sessions, having discourse of the sessions of P. tho' no action was tried there. R. 1 Rol. 39. l. 10. 41. l. 40.

At Hereford Assises, if he alledge, that he was a witness there. R. 1 Rol. 42. l. 25.

Thou art forsworn. Where? in Ilston court, innuendo a court leet. R. Cro. El. 720.

Thou wast forsworn in the leet. R. Cro. El. 492. Mo. 404, 537. Noy 34.

Thou tookest a false oath before just. W. having discourse of articles sworn before him. R. 1 Rol. 38. l. 50. D. 3 Lev. 166. R. Jon. 352.

Tho' the perjury is not within the stat. 5. El. for he shall be punished by the common law. R. 1 Rol. 42. l. 15.

So, he is forsworn in a court of record, without saying, in what court. R. 1 Rol. 42. l. 10.

He is forsworn on record. R. 1 Rol. 42. l. 30. Cro. El. 583.

He was forsworn, indicted, and compounded for it. R. 1 Rol. 40. l. 2.

Thou wer't forsworn, and I will set thee on the pillory for it. R. 1 Rol. 40. l. 15. 70. l. 25.

He is forsworn, and shall lose his ears. R. 1 Rol. 70. l. 10.

He was forsworn, and I will prove him perjured, or pay his charges. R. Cro. El. 429.

He is forsworn in every thing he swore in the cause, without saying, upon what matter the issue was. R. 2 Jon. 5.

So, with an inducement, that he was a witness in a suit in the county court such a day against the husband, if his wife say, thou art forsworn, thou tookest a false oath against my husband and me this day. R. Hard. 151.

(D. 8.)
Charge of
forgery,
&c.
Vide post.
(F. 6, 7.)

So, if he charge with forgery; as, if he say, he forged an obligation. R. 1 Rol. 65. l. 25.

I found the record he forged. R. 1 Rol. 65. l. 5.

He forged an acquittance. R. 1 Rol. 66. l. 11.

A privy seal, and commission. R. 1 Rol. 68. l. 35. Jon. 325.

A licence I had in the Exchequer. R. 1 Rol. 65. l. 35.

He forged two writs; tho' the forgery of a writ is not within the stat. 5. El. nor 1 H. 5. R. 1 Rol. 65. l. 15.

Thou hast forged a deed to cheat A. of his land. R. 1 Sid. 16.

That deed is forged, and B. made it. R. 1 Rol. 65. l. 45.

So, thou hast forged a deed, generally. 1 Sid. 16.

Thou hast caused a deed to be forged. R. 1 Rol. 66. l. 20.

Thou hast forged my father's will to deceive me. Semb. Lat. 11.

[You are a rogue, and I will prove you a rogue, for you forged my name. Jones v. Herne, P. 32 G. 2. 2 Wils. 87.]

Thou hast forged a warrant in such a suit. Per Twissd. 1 Sid. 16.

He forged B.'s will. 1 Vent. 149.

~~That he made a false record, &c.~~ R. 1 And. 121. ~~That he made a counterfeit warrant made by B. for the word, counterfeit,~~
is known in the law. R. 2 Rol. 266.

So, if there be a discourse of the plaintiff, and his office, as deputy clerk to A. and the defendant say, *he is a cozening knave, a cheater, and hath cozened his master.* R. Cro. Car. 563, 480. Vide post. (D. 21 F. 7.)

So, if he say, *thou art a branded rogue*; for it shall be intended, that he was branded according to the statute. 1 Rol. 43. l. 25.

Thou art a rogue on record. R. 1 Rol. 43. l. 30.

A runagate rogue, and deservest to be hanged. Qu. 2 Lev. 214. Vide post. (F. 7.)

So, if he say, *he made such a libel*, and shew the effect of the libel; for, for that he shall be fined, and imprisoned. Semb. 1 Rol. 46. l. 15. (D. 9.) Charge with words that subject to an indictment. Vide post. (F. 20.)

He conspired the death of B. 4 Leo. 54.

He is a false poller, and extortioner. R. 1 And. 120.

So, if he say, *she keeps a bawdy-house*; for it is indictable. R. 1 Rol. 44. l. 15. 61. l. 15. R. cont. Cro. El. 643. R. 1 Bul. 138. Per Glanvil, Anderson cont. Noy 73. R. Noy 117.

An house worse than a bawdy-house. R. 1 Rol. 68. l. 15.

A fortiori, if the party keeps an inn. Adm. Cro. El. 582. Vide 1 Bul. 138.

So, if he say, *she kept a bawdy-house*; for it shall not be intended of a time before a general pardon, &c. R. 2 Lev. 233.

So, in London where by the custom a common harlot shall be carted, if he say, *thou art a common whore, and I will have a bason tinged before thee.* R. 1 Rol. 36. l. 40. Vide 1 Rol. 550. A. (D. 10.) Or, to punishment by the custom of a place.

A bawd, and I will have thee carted. R. 1 Rol. 36. l. 50.

Thou art a whore, and my husband's whore. Per three J. Hide cont. Ray. 81. Vide 1 Rol. 550. l. 22.

So, in Southwark, &c. where there is the like custom. Semb. 1 Sid. 97.

So, if such action for these words be commenced in London, it shall not be removed by *habeas corpus*; or after removal, a *procedendo* shall be awarded. R. 2 Rol. 69. B. cont. 4 Co. 18. a. Cont. Cro. Car. 350. R. acc. Cro. Car. 487.

But the defendant may plead the speaking in another place, and traverse the speaking in London. 1 Lev. 116.

Or, if it appears upon the evidence, the defendant shall be found not guilty. Semb. 1 Lev. 116.

So, if the plaintiff do not shew, that her residence in London continues, judgment shall be stayed. 1 Sid. 97.

Or, if she alledge the custom to be, *quod exercentes artem meretricii et conservatores lupanarum* shall be carted, in the conjunctive. R. 1 Sid. 97.

So,

ACTION upon the Case for Defamation.

So, if the words do not charge directly, *that the woman is a whore*, but only tantamount, the custom of London does not extend to them. *Semb. Lut. 1042.*

So, if a woman has a copyhold, *dum casta*; and one say, *thou art a whore, I will throw thee out of thy living.* R. 1 Sid. 214. R. 1 Lev. 134.

So, when the ordinance was in force against adultery to say *thou art a whore, and gettest thy living by thy tail*, was actionable. *Hard. 107.*

So, in *Yorkshire*, to say *thou hast strained a mare*, with an averment, that in that county, that imports sodomy. *Pal. 64.*

(D. 11.) Words, which tend to his Dishonour.

Or words which tend to his dishonour; as if he say of one who takes land by descent, *he is a bastard.* R. 1 Rol. 37. l. 27.

Or, of an heir apparent who has an expectancy, which is endangered by the words. R. 1 Rol. 38. l. 5, 15. *Jon. 388. R. Godb. 451.*

Or, of one who purchased land; for then his land will not descend to the heir general. *Per Chamberlain, 2 Rol. 249.*

So, if he say of a woman who has a copyhold *dum sola et casta vixerit, she is a whore*, an action will lie. R. 1 Lev. 134. 1 Sid. 214.

And the action lies, tho' he do not alledge, that he lost his estate, or suffered other special damage. R. 2 Rol. 249.

And tho' he has no present estate, or title. R. 2 Cro. 213.

(D. 12.) But the words, *he is a bastard*, if they are spoken of an heir apparent generally, without other averment, are not actionable; for he has no present damage. 1 Rol. 37. l. 35.
 So, if he say, *he is base born*; for it shall be taken in *mitiori sensu*. R. 1 Rol. 37. l. 30.

(D. 12.)
 But where
 the dishonour
 is not
 apparent,
 they are not
 actionable.

(D. 13.) Words, which slander a Man in his Office.

(D. 13.) Or words, which slander a man in his office; as if he say of a judge, *he is a corrupt judge.* R. 4 Co. 16. a. 19. a. 1 Leo. 336.

(D. 14.) If he speak of a member of parliament, *he is a papist, and goes to mass, and was a pensioner.* R. 2 Vent. 165.

Member of
 parliament.

Or, of any candidate for an election to parliament. R. 3 Lev. 30. R. 3 Mod. 26.

Or, *he is a Jacobite, and for bringing in the Prince of Wales and popery.* R. Sal. 695.

[But if defendant says at a county meeting to consider of supporting the rights of election, *as to instructing our members to obtain redress, I am totally against that plan; for as to instructing A. (one of the members) we might as well instruct the winds;* and

and should he even promise his assistance, I should not expect him to give it us. It is not actionable; and judgment was arrested.
Onslow v. Horne, P. 11 G. 3. 3 Wils. 177.

If he speak of a justice of peace, he covereth felonies, and is not worthy to be a justice. R. 4 Co. 16. a. (D. 15.)

He hath taken money of a thief to keep him from gaol. R. 1 Rol. Justice of peace. (F. 8.)
 57. l. 15. *Vide post.*

By your means I had wrong at the sessions, you caused one to swear false against me. R. 1 Rol. 57. l. 25.

I could never have justice of him, but always injustice. R. 1 Rol. 57. l. 52. Cro. Car. 14.

He makes use of the king's commission to worry men out of their estates. R. 3 Mod. 71.

He is a forsworn justice, and not fit to be a justice. R. 1 Mod. 22. 1 Vent. 50. 1 Sid. 432.

[Speaking about a warrant granted by him—*If he is a sworn justice, he is a rogue, and a forsworn rogue.* Kent v. Pocock, T. 15 G. 2. Str. 1168.]

[Speaking of him concerning his office—*A. is a rascal, a villain, and a liar.* Aston v. Blagrove, 11 G. Fort. 206. 2 Ld. Raym. 1369. Str. 617.]

A partial justice. R. 2 Cro. 90.

He discharged A. arrested as accessory to a felony by an agreement of 3l. R. Cro. El. 536.

He uses corrupt practices, &c. none of conscience, or who fears God, would do the like. R. 1 And. 120.

He sent a warrant for A. for suspicion of felony, and sent B. to give him warning to be absent. R. 2 Cro. 143.

He wrests the law, and perverts justice to serve his own turn. R. 2 Cro. 240.

He of his own head put into A.'s examination, that he confessed he stole a lamb. R. 1 Rol. 58. l. 5.

He is a papist. R. 2 Vent. 265. Ray 483. Vide 3 Mod. 103. 3 Lev. 30. Dub. 2 Sho. 140. Vide 2 Sho. 250. R. cont. 2 Cro. 484, 5. R. acc. Skin. 68, 88.

His maid saw a priest give him the eucharist, and extreme unction. R. Skin. 98, 111.

He is a corrupt man, a vermin, &c. Dub. 1 Rol. 57. l. 20.

A. twice attempted to murder me, and this was by instigation of justice B. Per three J. 2 cont. 2 Cro. 56. Yel. 57.

He is a busy knave for searching after me, he shall give me satisfaction. Dub. 3 Mod. 163.

His witnesses were perjured, and he is the upholder of them. R. per 2 Bar. cont. Hard. 501.

If he speak of a clergyman, he preacheth lies in the pulpit; for it is a cause of deprivation. R. 1 Rol. 58. l. 30. (D. 16.)

Tonder is doctor A. robbing the church; he hath robbed the church. R. Jon. 366. Clergyman.

(D. 17.) Commif-
fioner for
examining
witnesses. If he speak of a commissioner for examining witnesses, *he hath taken bribes to favour B. in the execution of this commission.* R. 1 Rol. 56. l. 20. 2 Cro. 65. Yel. 62.
He hath put out some depositions, and added others not taken. R. 1 Rol. 57. l. 30. Pal. 67.

(D. 18.) Receiver. If he speak of a receiver in the court of wards, *Mr. deceiver hath cozened the king.* R. 1 Rol. 57. l. 40.

(D. 19.) Parish offi-
cer. If he speak of an overseer, or churchwarden, *thou hast cheated the parish of 40l.* R. 1 Rol. 58. l. 20. R. Cart. 1.

(D. 20.) Juryman. If he speak of a juryman, *thou art a common juror, and hast seen many overthrown by thy false and subtle means.* R. 1 Rol. 41. l. 35. Mo. 876.

(D. 21.) Steward,
&c. If he speak of a steward of a court leet, or court baron, *he put a presentment into the jury's verdict, without the consent of the jury.* R. 1 Rol. 56. l. 45.

Thou art a bribing corrupt knave, hast wronged me in the court of P. (where he was steward,) and hast not performed thy office according to law. R. 1 Rol. 56. l. 10.

Of a custom house officer, he took bribes. 1 Sid. 342.

Vide ante, (D. 8.)

(D. 22.) Words, which slander him in his Profession.

(D. 22.) As a coun-
fellow. Or words, which slander him in his profession; as if he say of a counsellor, *thou art no lawyer, canst not make a lease, they are fools who come to thee for law.* R. 1 Rol. 54. l. 47.

Thou a barrister? Thou a barreter, thou art put from the bar. R. 1 Rol. 55. l. 40.

He is a dunce, and will get nothing by the law. R. 1 Rol. 55. l. 5. Cro. Car. 382.

He has no more law than a jackanapes, &c. Godb. 441.

He will deceive you, he was my counsel, and revealed the secrets of my cause. R. 1 Rol. 57. l. 50. Co. Ent. 22.

He will give vexatious and ill counsel, stir up suits, and milk your purse, (written in a letter to his client.) Per three J. Vau. cont. 2 Vent. 28.

He is a daffy-down-dilly; which signifies an ambidexter. R. 1 Rol. 55. l. 15.

He hath undone many. Mar. 8.

But it is not actionable to say of a counsellor, *he has no more wit than a jackanapes.* Godb. 441.

He hath nothing but what he get by swearing and forswearing. Co. Ent. 21, 22.

He is a paltry lawyer. R. 2 Cro. 267.

(D. 23.) Physician, &c. If he speak of a physician, *he is a quack-salver.* R. 1 Rol. 54. l. 25.

Vide post.
(F. 15.)

Ho

He is an empirick, a mountebank. R. 1 Rol. 54. l. 35.
Thou never wast a scholar. R. 1 Rol. 54. l. 30. Godb. 441.
Thou gavest physick, which thou knewest to be contrary to the disease. R. 1 Rol. 71. l. 25.
If he say to a surgeon, thou art no good subject, for thou poisonest A.'s wound to get more money of him. R. Sav. 126.
Of a midwife, she is ignorant and unfortunate in her way. R. 1 Vent. 21.

If he speak of an attorney, you may be ashamed to employ that knave, &c. R. 1 Rol. 52. l. 35. Vide Mo. 61. (D. 24.)
He is a base knave, and maintains his wife by knavery, and cheating tricks. R. 1 Rol. 52. l. 50. Attorney, Vide post. (F. 9. 18.)

He is a cowering, cheating knave. R. 1 Rol. 53. l. 5. 15.
Thou art a knave, and such knaves made my husband spend his estate. R. 1 Rol. 53. l. 52. Al. 13.
He is a cheating knave, and maintains his family by cheating. R. Cro. Car. 515.
A bribing knave. R. Hob. 9. Mo. 855. 1 Rol. 53. l. 35. 54. l. 40.

A corrupt man and deals corruptly. Hob. 9.
Thou art an ambidexter. R. Godb. 214.
He is a cheating attorney. R. 1 Rol. 53. l. 25.
Your attorney hath taken 20l. of you to cozen me. R. 1 Rol. 53. l. 35. 54. l. 40. Hob. 9. Mo. 855.
He hath cozened him 10l. in a bill of costs. R. 1 Rol. 53. l. 50. 55. l. 45.

He deals on both sides, and deceives those who put him in trust. Noy 11.

[*Mr. H. is a rogue for taking your money, and has done nothing for it; he has not entered an appearance for you. He is no attorney at law; he don't dare to appear before a judge. What signifies going to him? He is only an attorney's clerk, and a rogue; he is no attorney.* Hardwick v. Chandler, T. 13 G. 2. Str. 1138.]

He is a forging attorney. Lat. 21.

He is a forging knave. R. 1 Brownl. 16.

Tell the knave R. I will teach him or any attorney to sue out a writ; for it is tantamount to knave attorney. 1 Vent. 117.

He is a champertor. R. 1 Rol. 53. l. 40. 55. l. 30. 1 Brownl. 15, 16. Mo. 867.

A common barretor. R. 1 Rol. 54. l. 51. Cro. Car. 192. Vide Hut. 104.

He stirreth up men to suits. R. 1 Rol. 54. l. 10.

He is a common maintainer of suits, and a champertor, I will have him thrown over the bar. R. Mo. 867.

A base rascal, I will make him lose his ears. R. Ley. 70.

He hath the falling sickness; for that disables him in his profession. 1 Rol. 55. l. 35.

He cannot read a declaration. R. 1 Mod. 272. 1 Lev. 297. Dub. 1 Vent. 98. R. Ray. 196.

He hath no more law than a goose, bull, &c. R. 1 Sid. 327.

[What does he pretend to a lawyer? He is no more a lawyer than the devil. Day v. Buller, P. 10 G. 3. 3 Wils. 59.]

(D. 25.) Words, which slander him in his Trade.

(D. 25.) Or words, which slander him in his trade; as, if he say of a merchant, or tradesman, *he is a bankrupt*. R. 1 Rol. 61. l. 35. 40. As, if they import, *H. is a broken bankrupt, and run his country*; without mentioning that he is a bankrupt. any certain trade. R. 1 Rol. 60. l. 40.

He is a beggarly knave not able to pay his debts; with an averment, that this imports a bankrupt. R. 1 Rol. 61. l. 10. 1 Sid. 424. 1 Lev. 276. R. Cro. Car. 472. R. Carth. 330. Vide Ray 184.

Or, *not able to pay 2s. 6d. in the pound*. R. 1 Rol. 61. l. 5.

[*You are a sorry, pitiful fellow, and a rogue, and compounded your debts for 5s. in the pound*. Stanton v. Smith, P. 13 G. Str. 762. Ld. Raym. 1480.]

Buy no more for him, he will never pay, and is not worth a penny. R. 1 Rol. 61. l. 45.

Thou owest more than thou art worth; whereby he could not be trusted. R. 1 Rol. 61. l. 50.

Of a scrivener, *he is a broken runaway, and dares not shew his face*. R. 1 Rol. 59. l. 40.

Of a farmer, carpenter, &c. R. 3 Mod. 112. Dub. 3 Mod. 155.

He is fled and gone, and I shall lose my money. R. 1 Lev. 276. Ray. 184.

He is run away, and never will return. Semb. 3 Mod. 155.

Many merchants have lately failed, and I expect no other of A. R. Ray. 207.

He is a bankrupt slave. R. 2 Cro. 578, 9.

Or, *a bankrupt rogue*. R. Cro. Car. 31.

He is broke, and dare not appear at the trial. Pal. 63.

He is a broken merchant. Jon. 321.

Of, an innkeeper, *deal not with A. he is broke; there is no entertainment for man, or horse*. R. Ray. 231.

(D. 26.) That he uses deceit.

So, if he charge him with deceit in his trade; as, if he speak of a weaver, *he pawneth the goods of his customers, and is not to be trusted*. R. 1 Rol. 59. l. 25.

Of a bailiff, *you cozened your master of a bushel of barley; innuendo, barley intrusted with him*. R. 1 Rol. 59. l. 35.

Of a journeyman shoemaker, *whoever hath him, he will cut him out of doors*; with an averment, that the words signify, he will undo his master. R. 1 Rol. 60. l. 5.

He hath cozened his master of 600l. R. 1 Rol. 60. l. 15.

Of a partner in trade, *he hath cheated his partner, for he received 20l. in partnership, and gave account but of 5l.* R. 1 Rol. 60. l. 30.

Of a goldsmith, *he is a cozening knave, he sold a chain of copper for gold*. R. 1 Rol. 62. l. 35.

Of

Of a leather-seller, *he will cozen you, he sold lamb for shamois skins.* R. 1 Rol. 63. l. 15.

Of a maltster, *he is a cheat and will cheat you; he cheated all the farmers at A. and is come to cheat at B.* R. 2 Lev. 62.

A cheating knave and keeps a false book. R. 1 Vent. 117, 263.

A cheating knave, and hath cheated me with brass money. R. Ray. 62.

He keeps false books, deal not with him. Pal. 65.

Or, if he charge him with male practice in his trade, as, if (D. 27.) he say of a brewer, *his beer is unwholsome.* R. 1 Rol. 62. l. 40. Or other

Of one who sells woad, *he mixes black mould with his woad, and sells it for woad.* R. 1 Rol. 63. l. 25. male practice.

Of one who keeps a boarding house, *you have starved children, you starved A.'s child to death.* R. 1 Rol. 63. l. 5.

So words, that defame a man in his trade are actionable; tho' the trade be mean or base. *Per three J. 1 Lev. 115. Ray. 87.*

But words, not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office, &c. *Mod. Ca. 202. Ray. 75.*

So, words of a groom, porter, &c. are not actionable, in respect of his employment. *1 Vent. 275, 6.*

Or, words spoken of a woman, who taught dancing, *that she is an hermaphrodite, and got A. with child;* without a special damage. R. 2 Lev. 233.

(D. 28.) Words, which charge him with an infectious Disease.

Or words, that charge him with an infectious disease, which prevents his conversing with others; as, *he is a leper.* R. 1 Rol. 44. l. 5. (D. 28.) As leprosy, plague, &c.

A leprous knave. R. 2 Cro. 144. 1 Rol. 44. l. 5. *Vide post.*

He buried people who died of the plague in his house; whereby guests refused his house. *Kil. 173. b. *but those words are actionable only on account of the special damage.** (F. 11.)

He hath the grand pox, or French pox. R. 1 Rol. 43. l. 50, 53. (D. 29.) French pox. *She is a whore, and hath the pox;* for that, by the word *whore*, is explained to be intended of the *French pox.* R. 1 Rol. 66. l. 37, 45. 1 Sid. 50. 2 Cro. 430. *Vide post.*

She is eaten up, or rotten with the pox. 1 Rol. 66. l. 41. 67. l. 15, 25. *Per Dod. 1 Rol. 420. Vide Cro. El. 648.* (F. 19.)

He is pocky, and the pox haunts him twice a year. R. 1 Rol. 66. l. 55.

He was laid of the pox. R. 1 Rol. 67. l. 5. Lat. 2. 2 Cro. 430.

Infected of the pox, and his wife is laid of it. R. 1 Rol. 67. l. 10. Cro. El. 289.

A pocky rogue, and for aught I know hath filled my bed with French pox. R. 1 Rol. 67. l. 35.

A pocky

A pocky-ars'd whore. R. 1 Sid. 50.

He got the pox of a red-haired wench. R. 1 Lev. 205.

He is burnt and hath the pox. R. Cro. El. 2.

She is a lewd woman, or common woman of her body, and hath the pox. Per Croke, 1 Rol. 420. 1 Rol. 66. l. 37.

Go to thy pocky wife, her nose is eaten with pox, and thou art a pocky knave. R. in an action by the husband for the words spoken of him. Cro. El. 878.

She is a whore and a pocky whore. R. Cart. 55.

He hath the pox, and lives incontinently. Pal. 64.

(D. 30.) Words, by which the party has a special Damage,

Vide post.

Or, any words by which the party has a special damage; as, (F. 20, 21.) *thou art a whore*; whereby she lost her marriage. 1 Rol. 35.

l. 15. 34. l. 40. Het. 18.

Or, *A. had use of thy body.* 1 Rol. 35. l. 5.

Or, *A. did get thee with child.* 1 Rol. 35. l. 2. 4 Co. 16. b.

She had two bastards, or, she had a child. R. Cro. El. 639.

Vide 3 Bul. 48.

Thou art a whore, and thy children by thy first husband are A's bastards; per quod, &c. R. Cro. Car. 322.

She lay with A. in a ditch, and his breeches were down, and they were at it; per quod, &c. R. 1 Rol. 66. l. 32. 1 Rol. 420.

She is a bursten bellyed quean; by which she lost her marriage.

She is a man, not a woman; per quod, &c.

So, if he say of a man, *thou art a whore-master, and hast laid with A's wife*; whereby he lost his marriage. 1 Rol. 35. l. 10. R. 2 Cro. 323. 2 Bul. 89. R. 3 Bul. 48.

Or, *was found in bed with A's wife.* R. 1 Rol. 35. l. 25. Cro. Car. 269.

So, *he had two bastards.* 1 Rol. 35. l. 45. 3 Bul. 48.

He was harsh to his former wife, and would not allow her necessities, per quod, &c.

So, if the words are written in a letter. *Vide Libel*, (B. 1.)

So, if she lose her marriage, it is a temporal damage, tho' the words are not spoken to the suitor, but to a stranger. R. cont. Cro. El. 787.

So, if by the words the party lose *consortium vicinorum*; as, *she is with child.* 1 Rol. 35. l. 20. Semb. cont. 1 Sid. 396. 1 Vent. 4. 1 Lev. 261.

If he lose the place of chaplain to a nobleman. R. 1 Lev. 248.

So, if by the words the party be accused, and put to expence for purgation: as, *he had use of my wife's body by force*; whereby he was accused of a rape. 1 Rol. 35. *Vide Lit.* 337.

If a parson declare a man to be excommunicated, when he was not; whereby he was removed from the church, and sacraments, and put to expence for his vindication. R. 1 Rol. 37. l. 5.

But

But it is not a sufficient special damage, *that a discord happened between him and his wife, and he was in danger of a divorce.* 1 Rol. 34. l. 45. Vide post (F. 20.)

That her father was in a passion, and put her out of his house. R. 1 Vent. 4. 1 Sid. 396. 1 Lev. 261. Vide post. (F. 20.)

That she lost consortium vicinorum. 1 Sid. 396, 7. Vide supra.

That the plaintiff himself, of whom the words were spoken, refused the marriage. R. 1 Rol. 35. l. 50.

That she was in danger of the stat. 18 Eliz. for having a bastard. cont. 4 Co. 16. But this reason was added by Coke, and not by the court. 1 Vent. 4. 1 Sid. 397.

That all persons refused marriage with him; without alledging any particular person. R. 1 Rol. 36. l. 15. Vide post. (F. 21.)

That he lost the affection of his mother, who intended him 100l. R. Cart. 1.

(E) Manner of Speaking.

(E. 1.) In an Oblique Way.

AND if words are slanderous, it is not material, tho' they are spoken indirectly, and obliquely: as, *I will make thee an example for a perjured knave.* R. 1 Rol. 49. l. 45. Yel. 160.

She went to the Sparrow to be cured of the French pox. R. 1 Rol. 49. l. 50.

I accuse thee of poisoning A. R. 1 Rol. 49. l. 54.

Of high treason. R. Hut. 131.

I will prove, or, I make no question to prove he poisoned A. R. 1 Rol. 50. l. 1. 5. Yel. 160. Cro. El. 569.

He was whipt for stealing, &c. 1 Rol. 50. l. 11.

I arrest thee, or, I charge thee with felony. 1 Rol. 72. l. 45. Cont. 73. l. 50. R. Jon. 302.

He is in gaol to be hanged for counterfeiting the king's hand and seal. R. Ray. 17.

[*A. was in Winchester gaol, and tried for his life; and would have been hanged, had it not been for Leggat, for breaking open the granary of farmer B. and stealing his bacon. Carpenter v. Tarrant, M. 10 G. 2. B. R. H. 339.*]

You will lie with a cow again as you did. R. 1 Sid. 220.

You deserve to be hanged for stealing. R. Pal. 68, 9.

You may well spend, &c. for you can coin, &c. for that imports that he had coined; otherwise he could not spend, &c. R. Sal. 697.

So, you have forgot since you lived at B. there you could clip, &c. R. Sal. 697.

You never thought well of me since B. stole my lamb; B. shall have an action. R. Cro. El. 289.

If you had had your deserts you had been hanged before now. R. Cro. El. 62.

Bear witness, he did steal. 2 Rol. 165.

Was

ACTION upon the Case for Defamation.

Was that all the spight that bastard could do me? 2 Rol. 165.
Bring home the 40l. you stole. R. 2 Rol. 165.
He is in gaol for stealing. R. cont. Hút. 2. R. acc. 2 Cro.
 247.
He was arraigned at the assizes for stealing. R. Jon. 299.
 Vide post. (F. 4.)

(E. 2.) By Way of Question.

Or, by way of question; as, *when wilt bring the stolen sheep
 thou stolest from A.?* R. 1 Rol. 48. l. 5. Mar. pl. 18. R.
 Pal. 66. 2 Rol. 165.
Why will he hang A.? For stealing, &c. R. 1 Rol. 50. 20.
Where is young A.? He is a thief. R. 1 Rol. 82. l. 10.
Did you not hear A. stole, &c. 12 Co. 134.
 Vide, ante. (E. 1.)

(E. 3.) Or, Conjecture.

Vide post. (F. 13.) Or, by way of conjecture: as *I think in my conscience, if he
 might have his will, he would kill the king.* R. 1 Rol. 49. l. 20.
 2 Cro. 407.
 Or, if he say, *if he might have his will, he would do so.* R.
 1 Rol. 48. l. 25. 49. l. 5. 2 Cro. 407.
 So, if he say, *he will be a bankrupt, or, will rob, A. &c. in two
 days.* R. 1 Rol. 49. l. 10, 15.
I do not know but A. sent B. to rob, &c. R. 1 Vent. 59.
He hides, and for ought I know is a bankrupt. 1 Vent. 60.

(E. 4.) As, Epithet.

Vide post. (F. 12.) Or, by way of adjective, or epithet to other words; as, *thou art
 a bankrupt knave.* 1 Rol. 47. l. 15, 20.
A steal sheep. R. 1 Rol. 47. l. 35.
A murdering rogue. R. 1 Rol. 47. l. 40. Cro. Car. 318.
 Jon. 326.
A traitorly knave. R. 1 Sid. 103. 1 Lev. 90.
A thieving rogue. 1 Sid. 373.
A bugging rogue. R. 1 Sid. 373.
A perjured whore. R. Hard. 7.
 So, if the epithet be joined to the scandalous words; as *thou
 art a whore-thief.* 1 Rol. 47. l. 55.
A coney-catching cheating thief. 1 Rol. 47. l. 50. (Vide
 Hard. 7.)

(E. 5.) Or, Report.

Or, by way of report: as, if he say, *A. spoke such words;*
 an action lies, with an averment, that *A. did not speak them.*
 R. 1 Rol. 64. l. 5. R. 12 Co. 134. R. 2 Cro. 162, 3. 406.
 3 Bul. 225.

Or,

Or, *A. told him B. stole, &c.* when *A.* did not say so. *R.* 1 Rol. 64. l. 15. *R.* 1 Lev. 82. 2 Rol. 165, 6.

A woman told me she heard one say. *R.* 1 Rol. 64. l. 25.

I heard a bird sing, or, I dreamed, &c. 1 Lev. 277.

So, if he say, *A. told me B. stole, &c. but I don't believe it.* Mar. 8.

But if a man say, *A. told me B. stole, &c.* when *A.* did really say so, an action lies against *A.* but not against the relator; for he names his author. *R.* 1 Rol. 64. l. 20.

You stole a mare, unless A. be forsworn. Vide 2 Cro. 530.

(E. 6.) Or, Exclamation.

Or, by way of exclamation; as, *that perjured villain!* *R.* 1 Rol. 76. l. 46. 84. l. 40.

(E. 7.) Where the Person is indirectly described.

So, it is not material, if the person of whom the words are *Vide post.* spoken, be described indirectly, when the person is ascertained; (F. 14.) as, *my master, Mr. B. hath robbed, &c.* an action lies by *B.* with an averment, that he was master to the person speaking. *R.* 1 Rol. 75. l. 35. Or, without the averment. *R.* 1 Rol. 79. l. 50. 80. l. 5.

So, if he say, *thou servest a traitor;* the master shall have an action. 1 Rol. 75. l. 25.

One of us is perjured; *B.* answers, *it is not I.* *A.* replies, *nor I.* *B.* shall have an action. *Dub.* 1 Rol. 75. l. 40.

If, upon a discourse of a bill in *chancery*, a man say, *those defendants murder'd, &c.* each defendant shall have an action. 1 Rol. 75. l. 45, 82. l. 25. *R.* Cro. Car. 512. *Vide* Jon. 409.

Thy landlord A. is a thief, *A.* shall have an action, with an averment, that the speaking was of him. *R.* 1 Rol. 79. l. 50. 80. l. 5.

This baker hath perjured himself. *A.* a baker shall have an action, with an averment, that the speaking was of him. *R.* 1 Rol. 80. l. 15.

So, *thy brother, or, thy son, is a thief;* the brother, or the son shall have an action with an averment, that the speaking was of him. *R.* 1 Rol. 80. l. 20, 35. 84. l. 35. *R.* 2 Cro. 107.

He that goes before thee is perjured; *A.* shall have an action, with an averment, that the speaking was of him, *et quod ille præviit, &c.* *R.* 1 Rol. 81. l. 5.

Where is that long-lockt murdering rogue? And being asked, *who?* He answered *A.* *A.* shall have an action. *R.* 1 Rol. 81. l. 51.

Mr. receiver hath deceived the king; with an averment that he was king's receiver, and the speaking was of him. *R.* 1 Rol. 82. l. 35. *Pal.* 69.

He, (innuendo the plaintiff,) and one Allen are perjured. *R.* 2 Cro. 102.

(E. 8.)

(E. 8.) Where the Slander is by *Antithesis*.

So, where the words are spoken by way of *antithesis*: as, *I am no traitor, but have seen thee in rebellion.* R. 1 Sid. 381.
1 Lev. 251.

He saith, I am perjured, he is perjured as well as I. R. 1 Lev. 65. Ray. 51.

I know what I am, I know what A. is, I never buggered a mare. R. 2 Lev. 150. 1 Vent. 276.

I am a true subject, thou art none. Godb. 441.

(E. 9.) Or the words import a Time past.

So, if the words import a time past; *he was a thief, and stole,* &c. R. 2 Cro. 622.

He came a broken merchant from H. R. per three J. Cro. Car. 317. Jon. 321. Hut. 125.

(F) What Words are not actionable.

(F. 1.) If they do not import a certain Charge.

(F. 1.)
Of treason.
Vide ante,
(D. 1.) post.
(F. 16.)

BUT words are not actionable, if they do not import a certain charge of some offence; as, *he is disaffected to the government.* R. cont. and affirmed upon error in the exchequer, but reversed in parliament. Ca. Parl. 14.

Thou servest no true subject. Cont. per two J. Fenner acc. 1 Leo. 336. 2 Cro. 202.

Thou art no true subject to the king, and that I will prove. R. 2 Cro. 202. Yel. 104.

Who is not the queen's friend, nor a true subject. R. Cro. El. 268.

(F. 2.)
Of Murder.
Vide ante,
(D. 2.)
Post. (G. 9)

So, if a man say, *he poisoned A.* without an averment, that he is dead. Semb. 1 Rol. 77. l. 45, 50. Cont. Cro. El. 823.

She threw her bastard into the dock, with an averment, that a dead child was found there; for it does not appear, that the same child was intended. R. 1 Rol. 79. l. 10.

She had a child, and made it away. Per three J. Bridg. cont. Cart. 55. *The action would certainly lie, if it were with an innuendo that she murdered the child.*

He cleaved his head, one part lay on one shoulder, another part on the other; without saying, that he was dead. R. 2 Cro. 184.
*In such a case an averment that he was dead seems unnecessary; *ideo quare.**

He murdered A's child modo defunct. without saying, that the child was dead at the time of the speaking. R. 2 Cro. 215, 343.

(F. 3.)
Of felony.
By statute.
Vide ante,
(D. 3.)
Post. (F. 17.)

So, if he say, *you bewitched my ware, I can take no fish.* 1 Rol. 45. l. 18.

Thou

Thou art a witch, I will make thee say, God save my mare. R. 1 Rol. 45. l. 40. Cro. Car. 320.

Thou art a witch, and by thy means I lost my mare; without saying that he lost her by her sorcery. R. 2 Cro. 531.

Thou enchantedst my bull, and made him run mad about the common. R. 1 Sid. 424. 1 Lev. 276.

Thou art a sorcerer, and inchanter. 1 Rol. 45. l. 10.

He ran away from his captain, and deserves to be hanged, without saying, that he was pressed. R. 1 Rol. 63. l. 50.

So, if he say, *he was whipt for stealing, or burnt in the hand, (F 4.) or shoulder; for he shall not be burnt in the shoulder for felony.* By the common law.

R. 1 Rol. 48. l. 30. Jon. 308.

He is in gaol for stealing; for perhaps he is not guilty. R. 1 Rol. 49. l. 30. Pal. 61, 9. R. cont. 2 Cro. 154, 247. *Vide ante, (D. 4.)* *Vide Post. (F. 17.)*

ante. (E. 1.)

He was taken for stealing, and I have long suspected him. R. 1 Rol. 49. l. 35. *Qu.* if he avers, that he never was taken. 1 Rol. 64. l. 45.

I charge thee with felony. 1 Rol. 73. l. 50. **Vide ante, (D. 3.) contra and with reason.**

He stole by the highway side; for it might be a stick or an apple. 1 Rol. 73. l. 2.

He pilfered away my goods. R. 1 Rol. 73. l. 15. (a)

He did filch 4l. from A. R. 1 Rol. 73. l. 20.

You use me as your wife did, when she stole my cushion, without an averment of the stealing. 1 Rol. 78. l. 25. (a)

He is infected with, or, smells of the robbery of A. Kit. 173. b. (a)

He was arraigned for stealing. Pal. 68. *Vide ante, (E. 1.) (a)*

A. lost plate, and he hath it, and will be hanged for it. Pal. 66. (a)

He was robbed and received the cloth back, and bears with the thief. R. 1 Rol. 67. l. 50.

I was robbed of a cloak and A. was present, and carried home the cloak, and compounded for the robbery. R. 1 Rol. 68. l. 5. **Qu.* Of these two last cases, for they subject a man to the penalties of the law.*

He was in Newgate for a highwayman. Dub. Sho. 291.

Thou hast committed burglary in breaking his house; without speaking of any one. R. 1 Rol. 71. l. 30. **Qu.* Of this, for the general charge of burglary might expose him to a prosecution.*

He is a cheat and stole two bonds from me. R. 1 Sid. 35.

He is a thief, and stole my furze; of which felony cannot be committed. R. Jon. 11. *Vide 2 Cro. 114.*

And stole my corn in my field; for it shall be intended, standing corn. 2 Cro. 205.

(a) *Qu.* Of all these cases, for the words are such as if true, would subject the party to the penalties of the law.

And

And stole iron bars out of my window ; for it shall be intended, bars fixed to the house. R. 2 Cro. 205.

*He stole Lord A.'s deer. R. Sal. 696. *But since the statutes have made these offences felony, such words would now be actionable. Vide stat. 4 Geo. 2. c. 32. and 7 Geo. 1. c. 22. 25 Geo. 2. c. 10.**

He is a thief, for he broke the chest of A. and took 40l. for it does not appear, that he took it feloniously. R. 2 Cro. 687.

[He was put in the round-house for stealing ducks at Crowland; are actionable, if laid to be spoken falsely and maliciously, otherwise not. Beaver v. Hides, P. 6 G. 3. 2 Wils. 300.]

[This child can hang you. Barnes 480.]

(F. 5.)
Of perjury.
Vide ante,
(D. 5. 7.)
Post. (F. 18.)

So if he say, *he is forsworn*, generally.

He is forsworn, for he set his hand to a bond, and swore nay. R. 1 Rol. 70. l. 5.

He delivered untruths in his answer in chancery. R. 1 Rol. 70. l. 15.

He was reprov'd in his oath at the assizes. R. 1 Rol. 73. l. 5.

*He perjuredly presented, &c. for this is not a direct charge. R. 2 Cro. 80. 120. Yel. 72. *But, Qu. whether this might not expose him to a prosecution for perjury?**

I have indicted A. of perjury, and doubt not to prove it. R. 1 Sid. 220.

So, if he say, *he perjuredly presented me at a visitation*; and do not shew for what offence, by which it may appear to be within his office. R. 2 Cro. 80. 120. Yel. 72. *Vide Supra.*

*He is perjured, for he was forsworn in the bishop of Gloucester's court, without saying, what court. R. 2 Cro. 436, 190. *Qu.**

(F. 6.)
Of forgery. l. 30.
Vide ante,
(D. 8.)

So, if he say, *he forged the queen's evidence. R. 1 Rol. 65.*

He forged writings, (without saying, what,) for which he should lose his ears. R. 1 Rol. 66. l. 5. 1 Sid. 16.

He forged this warrant; for the word (warrant) is uncertain. R. 1 Rol. 66. l. 25. 1 Sid. 16.

He put presentments into the jury's verdict without their consent; if he be not an officer. R. 1 Rol. 65. l. 50.

*B. hath found forgery against him, and can prove it. R. Hob. 305. *Qu.**

*He hath recovered 400l. by forgery, &c. R. 3 Leo. 138. *Qu.**

*He forged false letters. R. 1 Sid. 155. Vid. 1 Lev. 112. *Qu.**

*He gave me a false, and forged acquittance. 1 Sid. 155. 1 Lev. 112. *Qu.**

*He sued upon forged bonds. R. 1 Vent. 3. *for they might be forged without his knowing it.**

He is a knave upon record, a forgering knave. Dub. Lat. 21.

(F. 7.)
Of general
mistake-
fence.
Vide ante,
(D. 8.)

So, if he say, *thou art an arrant rogue. R. 1 Rol. 43. l. 22.*

A cozening rogue, and cozened me of 30l. R. 1 Rol. 68. l. 24. Kit. 173. b.

A scurvy

A scurvy bad fellow. 1 Rol. 43. l. 15.

A common wrong-doer, or villain. Kit. 173. Vide Mo. 29.

A false knave, rogue, usurer, &c. Kit. 173. a, b. Mo. 29, 79.

[Your father was a horse-stealing rogue, and you are a great rogue.

Bellamy v. Barker, P. 6 G. Str. 304.]

A cheating knave. R. 1 Sid. 35, 48. R. Sho. 181.

A forsworn fellow. R. 1 Sid. 48.

Of a trader, he is a very varlet, and a knave. R. 2 Cro. 204.

You be a cheat, and have been a cheat many years. R. Sal. 694.

A cozening rogue, a cut-purse rogue. R. 2 Cro. 536. Pal. 10.

Qu. of the last words.

Of a merchant, without a colloquium of his trade, he is a cheating rogue, a runagate rogue. R. Hard. 8. Vide 2 Lev. 214.

You are a cheating old rogue, and have cheated the fatherless and the widow; if laid without a colloquium of his trade. Ludwell v. Hole, P. 12 G. Str. 696. 2 Lord Raym. 1417.

[You cheated the lawyer of his linen, and stood barwd to your daughter to make it up with him. You cheat every body. You cheated me of a sheet. You cheated Mr. S. and I will let him know it: not actionable, without a colloquium of plaintiff's trade, Davis v. Miller, T. 15 G. 2. Str. 1169.]

He is a filching fellow. R. Pal. 29.

Mr. Mayor hath cozened the town and county. R. Jon. 308.

(F. 8.) So, General Words of any in Office.

So, if he say of a justice of peace, he is a blood-sucker, and will take a couple of capons. 1 Rol. 56. l. 52.

He is not worthy to live in a commonwealth. R. 1 Rol. 57. l. 5.

Thou lest the presentation by being a recusant. 1 Rol. 56. l. 40.

Qu. For what other kind of recusant is there but a popish recusant?

He is not worth a groat, and gone to the dogs. R. 1 Vent. 258.

He is a rascally villain, and keeps a company of thieves and traitors to do mischief. R. per three J. 2 cont. 2 Cro. 59.

You would be a justice like A. a fool, an ass, a buffle-head justice. R. 1 Sid. 67. 1 Lev. 52.

He was a debauched man, not fit to be a justice; for he speaks of a time past. 1 Vent. 50.

So, want of ability in a justice of peace is not actionable; for it is an office of honor only; as, he is a beetle-headed justice, an ass, a coxcomb, &c. Sal. 695. 1 Sid. 67. 1 Lev. 52.

He is a vermin, corrupt man, and a hypocrite. R. 1 And. 120.

So, if he say to an attorney, I'll have thee picked over the bar. (F. 9.) R. 1 Rol. 55. l. 20.

H. hath found forgery against him. R. Hob. 305. *Qu.*

He keeps his house, and compounds with his creditors. Pal. 10.

65. *Qu.*

Attorney.

Vide ante,

(D. 24.)

Post. (F. 18.)

So,

(F. 10.)
Trader.
Vide ante,
(D. 25.)

So, if he say of a man, who does not buy, nor sell, *he is a bankrupt.* 1 Rol. 44. l. 10.

So, if he say of a tradesman, *he cheated me of a noble in such goods*; for if he cozened him in the price it is no slander. R. 1 Rol. 55. l. 50. 62. l. 15.

His shop-book is a false book. R. 1 Rol. 62. l. 2. Pal. 65.

He hath cozened me in my measure. R. 1 Rol. 62. l. 10.

He hath cozened me of 500l. without speaking of his trade. R. 1 Rol. 62. l. 20, 30. 68. l. 26. Jon. 366.

He knows not how to make a good piece of work; without saying what, or a discourse of his trade. 1 Mod. 19.

He is a cheat, and I will prove him a cheat. R. 5 Mod. 398. R. Ray. 169. Hard. 8.

He is a varlet, suppressed his brother's will, and is a hypocrite. R. Pal. 21.

[Of a carpenter—he has charged A. for forty days work, and received the money for the work, that might have been done in ten days, and he is a rogue for his pains. *Lancaster v. French*, P. 1 G. 2. Str. 797.]

Of a brewer, *my mare pisses as good beer as he brews.* R. 1 Rol. 58. l. 35. Jon. 444.

Of a livery-stable-keeper, *he buys only stinking rotten hay*; for it is not a trade. R. 1 Rol. 59. l. 52.

Of a carrier, *he is a barretor.* 1 Rol. 59. l. 20.

(F. 11.)
A person

affected by a malady. Vide ante, (D. 28, 29.) Post. (F. 19.)

So, if he say, *Thou hast the falling sickness.* 1 Rol. 44. l. 7.

(F. 12.) Or, which charge only with an Inclination.

Or, if he charge only with an inclination: as, *thou art a thievish rogue.* 1 Sid. 373. Pal. 64.

Thou wouldst have killed me. R. 1 Rol. 51. l. 23.

Thou art a murderous quean. 1 Rol. 47. l. 30.

Thou keepest men to rob me. R. 1 Rol. 51. l. 1.

Thou procurest A. to come thirty miles to commit perjury; without saying, that the perjury was committed. R. 1 Rol. 51. l. 5. Vide ante, (D. 6.)

Thou didst go to D. and wouldst have given him money to rob A. and he did rob him. R. Jon. 84. *Qu. for this makes him an accessory before the fact.*

Thou didst suborn witnesses to swear, &c. if he do not shew a perjury committed. Semb. Mod. Ca. 202.

Or, *he is a rare chancellor to suborn witnesses, &c.* for it is only a description of the person, and does not charge him with any offence in his office of chancellor. Per two J. 2 cont. Sal. 696. Mod. Ca. 202, 3. *But qu. whether if spoken of the chancellor of Great Britain, this would not be *scandalum magnatum*.*

Thou art a bankruptly knave. 1 Rol. 47. l. 25.

Thou hast thievishly taken. 2 Cro. 81.

Thou hast dealt traiterously. Ibid.

(F. 13.)

(F. 13.) Or denote only the Opinion, or Suspicion of him who speaks.

Or, if the words denote only the suspicion of him, who speaks :
as, *he deserves to be hanged.* 1 Rol. 43. l. 10, 15.

I count thee to be a witch. 1 Rol. 46. l. 35.

If a man advise another to call in money from a tradesman, and to take heed how he trusts him. R. 1 Rol. 61. l. 30.

If he say, *I will prove thee a thief, I will prove it by thy son, or send him to the devil;* for the last words denote his doubt. R. 2 Cro. 214. *Qu. for the latter words are mere expletives, and the others are actionable.*

(F. 14.) Or, charge no Person certain.

Or, if the words charge no person certain ; as, *one of my brothers is, &c.* where he had several brothers. R. 1 Rol. 81. l. 25. (E. 3.)

If he say to three witnesses, *one of you is perjured;* none of them shall have an action. R. 1 Rol. 81. l. 35.

So, if he say, *my enemy is, &c.* no one shall have an action. 1 Rol. 81. l. 40.

The Boxes are traitors; none of that name shall have an action. 1 Rol. 80. l. 40. *But it is conceived that, if in the place where the words are spoken, there was only one family of the name, each individual might have an action. 1 Morg. Vad. Mec. 228.*

She had a child, and she or some body else made it away. Per three J. Bridg. cont. Cart. 55.

If words are uncertain, and cannot design any particular person, no averment shall make them actionable. R. 1 Rol. 81. l. 25. Vide post. (G. 9.)

(F. 15.) Or, are explained by other Words.

Or, are explained by other words to a different sense ; as, *He is a thief, and stole my corn off my land.* 1 Rol. 70. l. 37.

Or, *half an acre of my corn;* for it shall be intended growing. R. 1 Rol. 70. l. 41.

He is a thief, and took my goods in execution. R. 1 Rol. 51. l. 45.

He is a thief, and stole my furze, corn, tree, &c. R. Hob. 331.

And stole my bonds. 1 Sid. 35. *But now it would be otherwise, for stealing bonds is made felony.*

Of a physician, *he killed A. with physick.* R. 1 Rol. 71. l. 15.

So, if they are explained by precedent words ; *thou art drunk, and I shall not hold up my hand at the bar, as thou didst;* for that perhaps was for drink. 1 Rol. 71. l. 7.

He is a knave, and consented to take 20s. out of A.'s pocket. 1 Rol. 71. l. 10.

He

He stole my piece, and I charge him with felony; for the first words are insensible. R. 1 Rol. 72. l. 50.

Yet where defamatory words are in a distinct clause, they shall not be explained by the addition of another clause, which seems to make a qualification; as, *thou art a perjured whore, and forsworest thyself at W.* R. Hard. 7.

(F. 16.) Or, may be taken in *mitiori sensu*.

(F. 16.) Or, may be taken in *mitiori sensu*: as, *you are no true subject to the king*; for perhaps he had not paid taxes. 1 Rol. 43. l. 20, 69. l. 20.

Thou art a rebel; for it may be that a commission of rebellion issued out of chancery. R. 1 Rol. 69. l. 12. R. Cro. El. 878.

Thou art a coiner of money; for it shall be intended in the mint. R. 1 Rol. 72. l. 40.

A rebel against the king. R. 1 Sid. 132. *Qu. of the three last cases, for it is not probable that a person in a passion using such language to another should mean it in *mitiori sensu*.*

Thou hast sitten on the pillory. R. Cro. El. 62.

Thy warrants, (to serjeant Heale,) have undone many; for his warrant as a justice of peace may be intended. R. cont. in B.R. but reversed in the exchequer. Pal. 53.

(F. 17.) So, if one say, *You are a witch*, generally, without charging Or, to felony with an act within the stat. 1 Jac. 12. R. 1 Rol. 44. l. 52. 45. l. 2, 15. 25. R. 1 Sid. 52. R. cont. 2 Cro. 150, 306. R. acc.

2 Cro. 531. R. acc. Cro. Car. 282, 324.

She can witch, and unwitch. R. 1 Rol. 45. l. 10.

Thou committest sacrilege every day. R. 1 Sid. 376. 1 Lev. 250.

Qu. of this.

So, if he say, *thou hast stolen my furze*; for it shall be intended, growing. R. 1 Rol. 70. l. 51. Hob. 331.

He burnt my barn; for it shall not be intended, with corn. R. 1 Rol. 73. l. 35, 37.

I charge him with felony for taking money out of A's pocket; for it might be only a trespass. R. Hob. 305.

He stole my lead from my house. 1 Sid. 104. *but now this would be actionable since the stealing of lead from the house has been made felony.*

Or, *he stole the shutters of my window*; for they are parcel of his house. R. 1 Sid. 104.

He is a pick-pocket, he picked my pocket, and took away my money. R. 2 Lev. 51. 1 Vent. 213. *Qu. for one can hardly conceive a more direct charge of felony.*

It shall go hard with him for his life, but his estate he shall lose for marking my sheep. Ray. 12.

(F. 18.)

Or, to perjury, &c.

Vide ante,

(D. 5, 7—

(F. 5.)

If he say, *thou art forsworn*, generally; for it shall not be intended in a case, where perjury may be committed. R. 1 Rol. 39. l. 45.

Thou

Thou art forsworn in L. court; which does not appear to be a court of record. *R. 1 Rol. 39. l. 50. 40. l. 20. 41. l. 6. 69. l. 50.*

Or, if it do not appear, that the matter, in which the oath was, was within the jurisdiction of the court. *1 Rol. 40. l. 25.*

Or, if it is not averred to be at a trial, &c. *R. 1 Rol. 42. l. 25. 79. l. 15, 25.*

If this be law, one may with impunity charge another with perjury generally, for if he do not say it was at a trial, and add all the other circumstances requisite to constitute a perjury, the plaintiff cannot aver these circumstances.

Or, if he say, *he is forsworn, for he said, the wood was worth 40s. when it was dear of 13s.* for he does not directly say, that it was not worth 40s. *R. 1 Rol. 40. l. 40.*

So, if he say, *you lost the patronage by being a recusant*; for it shall not be intended a popish recusant. *R. 1 Rol. 38. l. 35.*

**2y.* for there are no other recusants known to the law.*

If he say to an attorney, *you are a maintainer of suits*, it shall be intended, in his practice. *Hob. 117. 1 Rol. 53. l. 40. 55. l. 25.*

[To say a man *has had* the pox is not actionable. *Taylor v. (F. 19.) Hall, T. 16 G. 2. Str. 1189.*]

So, if he say, *he is full of the pox.* *4 Co. 17. 1 Rol. 67. l. 20. Mo. 573.*

Thou art a packy whore, go to the leach for the pox. *1 Rol. 67. l. 30.*

A scurvy packy whore; for it does not appear by any circumstance, that he meant the French pox. *R. 2 Cro. 499.*

Thou art M.'s backney, thou art a thieving whore, a packy whore. *R. 2 Cro. 514. Godb. 278.* *In these three last cases, it seems impossible that any thing else but the French pox could be meant, and there is little doubt but the jury would find that was their meaning, if the declaration contained an innuendo to that purpose.*

So, if *Cornish, or Welsh* words have a double intendment, and import sometimes a mere taking, sometimes a felonious taking, they shall be construed in *mitiori sensu*. *Pal. 64. Vide 1 Rol. 71. l. 37.*

If by circumstances, mode of speaking, &c. it can be shewn that the speaker meant a felonious taking, the declaration, containing an innuendo accordingly, the jury will, if satisfied, find the innuendo, and the plaintiff be intitled to a verdict.

Yet, words shall not be strained contrary to the usual construction of them. *R. 1 Rol. 71. l. 45. (a)*

(a) Note; There is no breach of the law in which the decided cases are so contradictory to each other, and the decision so frequently irreconcilable with the avowed principles on which they are said to be founded, as the action on the case for words; many of the cases cited from the old authors are certainly not law, for which reason it is hoped the liberty taken under most of the foregoing divisions, in annexing queries and remarks, will be excused; as will also the observation, that "what words are actionable or not, will be more satisfactorily determined by an accurate application of the general principles on which such actions depend, than by a reference to adjudged cases, especially those in the more ancient authors." *Vide the case of Onslow v. Hume, 3 Will. 177, where the principles are well explained and illustrated by the chief justice.*

Or, as charging with a disease.

Vide ante, (D. 28, 29. —F. 11.)

(F. 20.) Or do not import any temporal Damage.

Vide ante,
(D. 10, 30.) Or if the words do not charge with an offence, for which the party shall have a temporal damage, tho' they are *contra bonos mores*; as, *you are a whore*. 1 Rol. 34. l. 40.

A whore-master. 1 Rol. 34. l. 40. *Vide Mo. 10, 29.*

A bastard bearing whore. R. 1 Rol. 36. l. 5.

An adulterer. Kit. 173. a. R. Mo. 29. *Vide 27 H. 8. 14. b.*

You are a whore, and A. had the use of thy body. R. Cro. El. 582. R. 1 Sid. 61, 62. Cont. 3 Mod. 120.

You was got with child by A; whereby her father discarded her. R. 1 Vent. 4. 1 Sid. 396.

Thou art a whore, and hadst a bastard by A; for it is no temporal damage, if no charge to the parish. R. Sal. 696, 693.

Thou art a common whore, and N.'s whore. R. 2 Mod. 296.

Thou hadst a bastard; if it does not appear that it may be a charge to the parish. R. 1 Rol. 37. l. 40. 38. l. 25. Sal. 694.

He is the reputed father of A.'s bastard. R. 1 Rol. 37. l. 45. Cro. Car. 436.

Thou hadst two bastards thirty six years ago; whereby there was discord between him and his wife. 1 Rol. 34. l. 50. 2 Cro. 473. 2 Rol. 24. Popph. 140. Godb. 273.

Thou art a barwd. R. 1 Rol. 44. l. 22. 1 Sid. 241.

A pimp. R. 1 Rol. 44. l. 30, 35. Cro. Car. 393.

Thou tookest 5s. to help two rogues, and whores to a clean pair of sheets. 1 Sid. 241. Ray. 115.

A barwd and pimp, and broughtest young gentlewomen to gentlemen. R. 1 Sid. 438. 1 Vent. 53. 1 Mod. 31. cont. *Is not this an indictable offence? If it be, to charge one with it, is actionable.

Thou art an heretick. Kit. 173. b. R. 27 H. 8. 14. b.

So, if he say of one not a trader, *you are a bankrupt*. 1 Rol. 44. l. 10.

Of one not of a profession, *you are a common barrator*. 1 Rol. 44. l. 12. Kit. 173. a.

(F. 21.) Or, the temporal Damage is remote.

Vide ante,
(D. 30.)

So, if the temporal damage is not of moment, or is remote: as, if the party alledge, *that by reason of the words all honest persons matrimonium hucusque recusaverunt, et adhuc recusant*, without speaking of any particular marriage. R. 1 Rol. 36. l. 15. tho' it be found by verdict.

That she lost her marriage, without alledging any particular suitor. R. 2 Cro. 499.

That he said of a butcher speaking of his meat, the cow died in calving, whereby he lost his customers. R. Sal. 693.

So, if the temporal damage is not present: as, if one say, *he was not fit to be a justice*; for he may be now fit. 1 Rol. 48. l. 15.

So,

So, if he say, *he lost the patronage by simony*; for he lost it only, *unicā vice*. R. 1 Rol. 38. l. 35.

So, *he had the French pox*; for he may now be cured. R. 1 Rol. 48. l. 20. 67. l. 31. R. Noy. 151. Per two J. al. 30.

So, if the damage be by accident, and not a direct consequence of the words; as, if a man say to a servant, *thy mistress is a whore*, whereby she loses her marriage; if the words are not spoken to the person in treaty for the marriage. R. Cro. El. 787.

If he say of a school-mistress, *you are a whore*; if no special damage is alledged. 1 Vent. 21.

So, if the verdict find for the defendant as to the special damage; tho' it find the speaking of the words. R. 2 Mod. 296.

(F. 22.) When spoken in a Course of Justice.

Or are spoken in a course of justice; as, if a man object to a witness, *that he is perjured*; tho' it be false. 1 Rol. 33. l. 5. Vide 2 Cro. 91.

Or say, *that an affidavit against him is false*. R. 1 Rol. 33. l. 45. 87. l. 30. Jon. 431.

[If on motion for information against a justice, supported by affidavit of A. defendant in his affidavit in answer denies the charge, calling it *what A. has so falsely sworn against him*; action does not lie. *Affley v. Younge*, T. 32 & 33 G. 2. 2 B. M. 807.]

So if a man exhibit an indictment, appeal, &c. of murder, felony, perjury, &c. of which the party is acquitted. Vide 2 Inst. 228. Vide *Action upon the Case for a Conspiracy*, (B.)

So, if a man speak scandalous words to his counsel, solicitor, &c. in order to have an action, or other prosecution in a course of justice against a person. 2 Inst. 228.

Or, deliver them in evidence to a jury. *Ibid*.

So, if a counsel speak words material to the issue; tho' they are false and scandalous. 1 Rol. 87. l. 5. 2 Cro. 90. Vide Mo. 79.

As, where the question is of the bankruptcy of A. if a counsel say expressly, *that he is a bankrupt*, tho' he be not. R. 1 Rol. 33. l. 20.

So, tho' the words are not directly material to the issue: as, in false imprisonment, the defendant justifies, that the plaintiff did not find sureties for his good behaviour, issue *de son tort*, and at the trial a counsel says, *that the plaintiff was a man of bad fame, and had committed felony*. R. 1 Rol. 87. l. 20. 9 Cro. 90.

So, if a man deliver a petition, containing scandalous matter, by way of complaint to the members of parliament. R. 1 Lew. 240. 1 Sand. 131.

Though it be printed, and delivered to the members; for the usage of parliament warrants the printing, whereof the court will take judicial notice. R. 1 Sand. 131. 1 Lew. 240.

Otherwise, if he deliver it to others. *Semb. 1 Sand. 131.*

1 *Lev. 240. 1.*

So, if he deliver a petition or bill to the King, which contains defamation; for he is the fountain of justice. 3 *Leo. 138.*

Otherwise if he afterwards publish the contents to others.

3 *Leo. 138.*

So, if by a suggestion defamatory to *B.* any one obtains the revocation of a patent to *B.* and a grant to himself, and afterwards upon a reference to the attorney general says, *that the suggestion is true. R. cont. but judgment afterwards reversed. Hard. 223, 4.*

So, if a defendant in trespass plead, *that the plaintiff is a bankrupt*, tho' he be not, an action does not lie. 2 *Cro. 432.*

So, if upon a libel in the spiritual court *A.* be produced as a witness, and the defendant make an allegation in writing, *that he was perjured*, in order to avoid his testimony; tho' the allegation be false, an action does not lie for this against the defendant. 1 *Rol. 33. l. 5. 2 Cro. 432.*

But if a counsel, &c. offer, in evidence scandalous matter, which is not material, nor pertinent to the issue, an action lies against him, if it be not true; for it shall be intended to be spoken *malitiose.* *Semb. 2 Cro. 90.*

(G) Declaration for Words,

(G. 1.) Must shew the Plaintiff to be of good Fame.

A Declaration for words usually shews, that the plaintiff is of good fame, and clear of the crimes, for which he is defamed.

(G. 2.) Cannot be for, or against two.

And two cannot join in it; for the wrong to them is several. *R. Dy. 19. a.*

Nor can it be against two for the same words jointly: *Dy. 19. a. in marg.*

Tho' it be against husband and wife for a speaking by both. *Dy. 19. a. in marg.*

(G. 3.) If the Charge be in respect of an Office, &c. must shew his Office, &c.

So, if the charge be in respect of an office, profession, trade, &c. it must shew his office, &c.

And generally, it ought to shew, that he was in office at the time of the speaking; as, if one says of a justice of peace, *he takes bribes*, it must shew, that he was *then* in the commission. *R. Yel. 159.*

And, *cum per multos annos jam elapsos extiterit*, &c. is not sufficient. *R. 2 Rol. 84. R. Cro. Car. 282. Vide Yel. 159.*

So, if he say, *he is a bankrupt*, the declaration must shew, that he was *then* a trader. *Dan.* 170. *Cro. Car.* 282. *Vide Yel.* 159.

If he speak of a barrister, or physician, &c. it must shew, that he was *then* a counsellor, or licentiate. *Dan.* 169. *Vide Yel.* 159.

So, if he charge with words not actionable, but in regard of his trade, profession, &c. it is not sufficient to alledge the speaking of *him*, without a *colloquium* of *his trade*, &c. *R.* 1 *Lev.* 250.

But, so exact an allegation of a continuance in office, &c. is not necessary, where the words import it; as, if he say of an attorney, *he is an ambi-dexter.* 2 *Rol.* 85.

So, speaking to a servant, *thy master*; it is not necessary to say, that he was servant at the time of the speaking. *Vide Ley* 82.

And after a verdict, *cum fuit mercator*, &c. seems good; for it shall be intended, that he continued his trade, &c. *Dan.* 169. *R.* 1 *Sid.* 425. *R.* 2 *Cro.* 222.

So, if the speaking be alledged to be *of the plaintiff and his art*, it is sufficient, without an express *colloquium* of *his trade*. *Dub.* 1 *Lev.* 115. *Ray.* 87. *R.* 2 *Cro.* 241, 673.

So, a *colloquium* of office, trade, &c. is not necessary, when the words import it. *R.* 1 *Lev.* 280. *R.* 2 *Lev.* 62.

(G. 4.) Must shew a Publication.

And the declaration must shew a publication of the slander; and therefore, the plaintiff shall say, that the defendant *in presentia et auditu diversorum ligeorum dixit*, &c.

And, if the words are *Welsh*, or *Latin*, he must aver, that the hearers understood such language. *Hob.* 268. *R.* 1 *Rol.* 74. *A. Mar.* 2. 16. *Dan.* 146.

And an averment, that they understood *linguam Romanam*, is not sufficient, where the words were *Latin*; for that imports *Italian.* 1 *Rol.* 74. l. 30.

But, if he alledge the speaking to be *palam, et publice*, &c. it is sufficient, without saying, *in presentia et auditu.* *R.* after verdict, *Cro.* 861. *Dan.* 168.

So, speaking *in presentia*, without saying, *auditu*; for it shall be intended in their hearing. *R.* after verdict, *Cro.* El. 486. *Noy* 57. *R.* 2 *Cro.* 39. *R. Cro. Car.* 199. *Dan.* 168.

And, if in the first count it be said, *in presentia et auditu*, and omitted in the second count, yet it is sufficient. *R.* 2 *Lev.* 193.

So, if the words are *English*, tho' peculiar to the dialect of any country, the signification need not be explained; for the court ought to take notice of the signification of all *English* words. *Dan.* 161. *Vide post.* (G. 6.)

(G. 5.) Must shew a Malicious Intent.

So, the declaration must shew a malicious intent in the defendant.

But

But it is sufficient to say, *falsè dixit*, without *malitiæ*. R. Mo. 459. Ow. 51. Noy 35.

Or, *machinans peiorare dixit*. Dan. 166.

(G. 6.) Must alledge expressly, what Words were spoken.

So, the declaration must expressly alledge, what words were spoken.

And therefore if it says, *quod defendens dixit hæc verba, vel consimilia*, it is bad for the uncertainty. R. Cro. El. 645.

Or, *verba, quorum tenor sequitur in hæc verba, thou, &c.* R. Cro. El. 645. 857.

Or, *ad tenorem et effectum sequentem*. R. 3 Mod. 72. Adm. tho' *tenor* is sufficient for a libel; for *tenor* imports a copy or transcript; and therefore, if the words, *quorum tenor, &c.* are alledged, it may be compared with the original libel; but there cannot be a *tenor* of words; and therefore, if words are alledged *juxta tenorem sequentem*, it has never been allowed. Sal. 661.

But it is sufficient to say, *quod dixit verba prout in his Anglicanis verbis sequentibus*. R. Cro. El. 572.

And the plaintiff need not give the signification of any English words, tho' they are unusual, and peculiar to a particular country; as, *healer of thieves, &c.* 1 Rol. 86. l. 5. Vide ante, (G. 4.)

So, tho' they are *Welsh* words, he need not give the signification in his declaration. R. 1 Rol. 86. l. 50.

[It may either lay the words spoken, or set out the substance of the words; if the substance only be set out, as that defendant charged plaintiff with such or such a crime, then it is sufficient to prove the substance. *Nelson v. Dixie*, T. 9 G. 2. B. R. H. 305.]

[But if the very words are laid, those words must be proved as laid. *Ibid.*]

[Yet if there is a variation in the order of the words, so it be agreeable in substance, it is sufficient. *Ibid.*]

[So, if immaterial words are proved to be spoken, more than laid in the declaration. *Ibid.*]

[So if the words are laid—*You are so and so*, and the words proved are—*He is so and so*; such variance is immaterial. *Ibid.*]

But if the words laid are—I will hang *him*, and the words proved are—I will hang *them both*; it is a material variance, and plaintiff shall be non-suited. *Ibid.*]

(G. 7.) And, that they were spoken of the Plaintiff.

The words must be expressly alledged to be spoken of the plaintiff; and therefore, if the declaration does not say, *quod defendens dixit de querente*, or words *tantamount*, it is bad, generally. R. 1 Rol. 85. l. 20.

Tho' it be, *dixit, he (innuendo) the plaintiff*. R. 2 Cro. 126.

But, if the declaration be, *quod dixit eidem querenti, thou, &c.* that is *tantamount*, as if it had said, *de querente*. R. 2 Cro. 39.

So, if the words are in the second person, *thou*, &c. and the plaintiff alledge a *colloquium cum querente*, it is sufficient; tho' he does not say, that the speaking was *de querente*, or *eidem querente*. R. 1 Rol. 85. l. 30.

So, if he alledge, that the speaking was *de querente*, tho' the words are, *thou*, &c. it is sufficient. R. 2 Cro. 39.

Yet, a *colloquium de querente* is not sufficient, where the words are in the third person, *he*, &c. without saying also, that the speaking was *de querente*, or, *eidem querente*. R. 1 Rol. 85. l. 25. 1 Sid. 52.

It is not necessary to alledge with whom the *colloquium* was; for perhaps he did not know. R. 2 Jon. 5.

And a general allegation is sufficient; as, *habens colloquium de arte sua*. Dub. Ray. 86, 7.

(G. 8.) When an Averment is necessary.

If the speaking be of a man by a character, or description, which may be affixed to several, it is not sufficient to say, *quod dixit de querente*, or *querenti*, or that he had a *colloquium de querente*; as, if he say, *thy son, brother, landlord*, &c. or, *my father, son*, &c. is a thief; but the declaration must aver, that the plaintiff was his brother, landlord, father, &c. R. after verdict, 1 Rol. 84. l. 15, 30, 50. 85. l. 45. Dub. after verdict, Cro. Car. 177. R. after verdict, Cro. Car. 443. Jon. 376. R. Cro. El. 416. Vide 1 Rol. 79. H.

But where the speaking denotes any particular person, tho' it be by his trade, profession, &c. it is sufficient to alledge a *colloquium de querente*, without other averment: as, if one say, *captain T. the villain T.* &c. it is not necessary to aver, that he was a captain, &c. R. 1 Rol. 84. l. 43, 85. l. 5, 15. Vide 1 Rol. 79. H.

So, if he say, *T. innuendo*, the plaintiff, where the speaking is alledged of the plaintiff, it is sufficient. R. 1 Sid. 52.

So, if the speaking is alledged of the plaintiff, and it is said, *T. is thy brother*, *he (innuendo, the plaintiff)*, &c. it is sufficient, without other averment. R. 10. El. 429.

If an action *de scandalis magnatum* alledge the speaking to the servant of an earl, and speaking of the earl, it is sufficient, without an averment, that he was an earl at the time of the speaking. R. Cro. Car. 136. Jon. 194.

If the words have relation to another fact, there must be an averment of such fact: as, if one say, *he is as great a thief as any in England*, or, *in such a gaol*, &c. it must be averred, that there are thieves in England, or in the said gaol. R. Cro. El. 214. Tel. 90. Dan. 151. R. 2 Cro. 687. Hut. 72.

There was no robbery within 40 miles of W. but thou hadst an hand in it; it must be averred, that a robbery was committed within 40 miles of W. R. Cro. El. 308, 342. 2 Rol. 92.

He took a false oath at the assizes; it must be averred, that he was sworn there. R. Mar. 7.

If

ACTION upon the Case for Defamation.

If the words import, that *A. said the words to him*; it must be averred, that *A. did not say them.* *R. 1 Lev. 82.*

Where an averment is necessary, it shall not be supplied by an innuendo. *1 Rol. 83. l. 10. ad. 40, 84. l. 25. Hob. 6.*

(G. 9.) When not.

But where the words admit, or import such fact, no averment of the fact is necessary; as, if one say, *he killed A.* no averment is necessary, that *A. was killed, or is dead.* *Dan. 150. 1 Sid. 53. 1 Vent. 117. R. Cro. El. 823.*

So, if he say, *he poisoned A.* if he does not appear upon the record to be alive. *Dan. 151. R. cont. Hob. 6. Acc. 1 Sid. 227.*

I have indicted A. for perjury; there is no need of an averment, that he was indicted. *Semb. 1 Sid. 227.*

[In an action for saying *falsely and maliciously* that plaintiff had been in gaol and tried for his life, it is not necessary to aver he never was in gaol nor tried.] *Carpenter v. Tarrant, M. 10 G. 2. B. R. H. 339.*

He cannot read a declaration; there is no need of an averment that he can. *R. 1 Lev. 297.*

So, if he say, *A. will prove the plaintiff said, he killed a man, &c.* it is not necessary to aver, that no one can prove it; for the words are not spoken as the relation of another, but his own undertaking, that such a person will prove, &c. *R. 3 Lev. 171.*

So, where the words have relation to a thing apparent, it need not be averred. *Vide Pleader, (C. 78.)*

As, if one say, *as sure as God governs the world he is a traitor*; there is no need to aver, that God governs the world. *1 Sid. 53.*

He is a witch as sure as A. who is hanged for it; it is not necessary to aver, that *A. was hanged.* *1 Sid. 52.*

So where it was said, *as sure as king James governs this realm*; an averment was not necessary. *1 Sid. 53.*

He is a perjured rogue as well as I; there is no need of an averment, that he is perjured; for it is admitted by the speaking. *R. 1 Lev. 65.*

So, where the words are actionable without those that are relative, there is no need of an averment of the thing, to which the relation is made: as, if one say, *he is a thief, and hath stole more goods than I am worth*; an averment is not necessary of, how much he is worth. *R. 2 Bul. 142.*

When words are uncertain in themselves, an averment cannot ascertain them. *1 Rol. 79. H. 81. l. 25. Vide ante. (F. 14.)*

As, if a man say, *thou didst throw thy bastard into the dock at W.* an averment, that a child was found there dead, does not make the words actionable. *R. 1 Rol. 79. l. 7.*

So, an averment shall not enforce words contrary to their proper signification. *1 Rol. 86. l. 30.*

(G. 10.)

(G. 10.) Words explained by an Innuendo.

The plaintiff must explain the words by an innuendo.

[That rogue A. *that set the house on fire* (meaning the house of B. that was burnt;) and *if any body will give me charge of him, I will carry him to New Prison*; and another set of words, *A. set the house on fire*, (meaning the same house.) The latter set of words shall have relation to the former, and after verdict for plaintiff shall be taken to be spoken maliciously. *Tindal v. Moore*, H. 33 G. 2. 2 *Wils.* 114.]

But the innuendo only explains, and does not enlarge the words. 1 *Rol.* 82. l. 46, 51. 83. l. 1.

As, *he forged this warrant, warrantum per vicecomitem super capias innuendo*, is not sufficient. *Hob.* 2. *Qu. For it seems only to explain.*

So, an innuendo does not ascertain words, which are uncertain in themselves. 1 *Brownl.* 7.

As, *a priest (innuendo a popish priest,) gave him the eucharist and extreme unction.* *Cont.* 3 *Lev.* 68. *Qu. Whether *Lev.* be not law.*

He was forsworn before justice S. innuendo A. S. justice of peace. *R.* 3 *Lev.* 166.

He swore A. was at N. innuendo N. in com. D. ubi revera non fuit apud N. præd. *R.* *Sal.* 513. *In the two last cases the innuendo seems only to explain, and not to enlarge the words.*

Thy father, innuendo the plaintiff, is a thief; without an averment, that the speaking was to the son of the plaintiff. *R. Cro. Car.* 92.

And if the innuendo be repugnant, it is void. 1 *Rol.* 83. l. 50. 84. l. 5.

As, if a *feme covert* say, *you stole my faggots, innuendo the faggots of the husband and his wife.* *R. Pal.* 358. *But Qu. Whether it would have been repugnant to say innuendo the faggots of the husband; in common parlance the wife might call them *her* faggots, tho' in point of law they were her husband's.*

(G. 11.) Special Damage alledged.

If there be an action for words, which are not actionable without a special damage, the plaintiff must alledge the particular damage he has sustained. *Jon.* 196.

So, in an action upon the case for the slander of a title. *R. Jon.* 196.

And it is not sufficient to say, *per quod he lost the sale of his land.* *Ibid.*

But in an action upon the case for slander of a person, it is sufficient to say, *ad damnum, &c.* without shewing any special damage. *Ibid.* *This must be taken to mean where the words are actionable of themselves.—*Vide in Str.* 666. a *Nisi Prius* case which seems *contra*, but appears not to be law.*

Tho'

ACTION upon the Case for Defamation.

Tho' it be for words against him in his profession. *Ibid.*

Plea to an Action for Words.

Vide Pleader, (2 L. 2, &c.)

ACTION upon the Case for a Disturbance.

(A) When it lies.

(A. 1.) For a Disturbance in a Common.

SO an action upon the case lies for a disturbance in the enjoyment of that, in which a man has a right or interest: as, in disturbance of his common by an inclosure, *per quod uti non possit. Vide 2 Cro. 629.*

Or, by ploughing it. *2 Leo. 184. Cro. El. 198.*

Or, by putting cattle there, *per quod in tam amplo modo habere non possit. R. 9 Co. 112. Lut. 102, 3.*

Or, by putting conies there, *per quod, &c. 1 Rol. 106. l. 25. Dan. 175. R. cont. Cro. Car. 387. Vide infra.*

Or, by digging turfs, and carrying them away with horses *herbam ibidem conculeando, per quod, &c.* for tho' the common has no damage by the digging and carrying away the turfs, yet the coming with horses and carts upon the grass is a prejudice to the common. *R. 1 Rol. 89. l. 40. Dan. 174.*

Or, by furcharging the common, whereby he has not sufficient common. *Lut. 107. Vide Common, (I.)*

But it does not lie, if the lord of the manor put conies upon the common. *R. Lut. 107, 8. Cont. Jon. 12. Vide supra.*

Or, if the lord put his cattle there, *per quod tam amplo modo uti non potest. R. Lut. 107,*

(A. 2.) In a Way.

So, for a disturbance in the enjoyment of his way, by stopping it, *per quod uti non possit. 3 Lev. 266. 1 Vent. 275. 2 Vent. 186.*

Be it a way by reservation, or grant, or prescription. *1 Rol. 109. l. 45.*

So, for ploughing up the land, through which the way lies. *2 Rol. 140. l. 7. Semb. Cro. El. 198.*

Tho' it be a way to his freehold, for which an assise lies. *R. Cro. El. (466.) R. Cro. El. 845. 1 Rol. 104. l. 30. Semb. Cro. El. 199.*

So, for damaging the way by carriages, *ita quod it is of no use. Lut. 111,*

(A. 3.)

(A. 3.) In a Seat in a Church.

So, for a disturbance in a seat in the isle of a church, where a man has a right by prescription. *R. 1 Sid. 88, 203. Ray. 52. 1 Lev. 71. 2 Jon. 3, 4. R. 2 Lev. 193. R. 3 Lev. 73. Vide Eglise, (G. 3.)*

Or, in nave ecclesie. *Semb. Hob. 69.*

Or, in the chancel. *Semb. Noy 133.*

Or, for the first place, &c. in a seat. *Vide 1 Sid. 89. Vide Noy 133.*

And against a stranger, it is sufficient to declare upon his possession, without alledging usage to repair, prescription, or other ground of the action; for it is sufficient to be proved in evidence. *R. 3 Lev. 73, 4. R. 2 Lev. 193. R. 1 Lev. 71. 1 Sid. 88, 203. Vide in Pleader, (C. 39.)*

So, it is sufficient to say, that the defendant disturbed him, without mentioning specially, how the disturbance was. *R. Bridg. 4.*

(A. 4.) In Foldage.

So, for a disturbance in his foldage, by putting cattle into the land, where sheep to be folded ought to feed, *per quod faldagium habere non potuit.*

By erecting herdals in his land, where the foldage ought to be, without licence of the lord contrary to the custom. *R. 1 Leo. 11.*

(A. 5.) In an Office,

So, for a disturbance in the enjoyment of the profits of his office. *Mo. 706.*

But, it does not lie for a disturbance in the office of parish clerk; unless he shew, that he was chosen by the parish, and had certain fees. *Dub. Sal. 468.*

So it lies if a man disturb another in the execution of his office: as, if when an officer is taking the poll for an election of a new officer, *A.* takes his papers from him. *R. 2 Mod. 228.*

So, if a man do not pay to the post-master the ancient fees of his office. *Lat. 87. (a)*

(A. 6.) Or, other Possession.

Or, other possession; as, if a lord of a manor prescribe to have toll, and be disturbed in the collecting of it. *1 Rol. 106. l. 40, 43.*

(a) With respect to fees of office, the common mode of proceeding now is, by action for money had and received, in which action the title to the office is tried. *1 Morg. Vade Mec. 254.*

Or,

Or, prescribe for him and his tenants to be quit of toll, and toll is collected of them. *R. 1 Rol. 105. l. 10. 107. l. 5.*

So, if the lord of a leet be disturbed in holding his court. *1 Rol. 106. l. 49.*

Or, in collecting the fines, amerciaments, &c. imposed at the leet. *1 Rol. 106. l. 45.*

Or, his tenants are impoverished by distresses to come to another court. *1 Rol. 106. l. 52.*

So, if a man disturbs the servant of another in the collecting of his tithes due. *1 Rol. 107. l. 7.*

Or, disturb a lessor in his entry to view, whether the lessee hath committed waste. *R. 1 Rol. 109. l. 5.*

If a man take toll of him, who ought to pass a ferry toll-free. *R. 1 Sal. 12.*

If a man prevent a parishioner from entering into the vestry-room where he had a right to be present. *2 Mod. Ca. 52, 354.*

(B) The Proceeding in an Action for a Disturbance.

(B. 1.) The Declaration.

IN an action upon the case for a disturbance against a wrong-doer, it is sufficient, that the plaintiff in his declaration says, *habere debet*; without shewing a title by grant, or by prescription. *Vide in Pleader, (C. 39.)*

Tho' the plaintiff be a copyholder. *Lut. 125.*

Yet he may entitle himself by custom, or prescription.

And a variance found by verdict from the prescription alledged, is only inducement, and does not hurt. *R. 2 Cro. 630.*

And in such case, the custom cannot be applied to a particular house, &c. *R. Lut. 127, 8.*

So, it is sufficient that the plaintiff alleges a seisin in fee of the messuage, &c. to which the thing, in which he was disturbed belongs; without saying, that it was an ancient messuage, &c. *R. 2 Cro. 605.*

So it is sufficient to alledge a disturbance generally; without shewing the particular manner of the disturbance. *R. 2 Cro. 606. Vide Bridg. 4.*

But the declaration ought to shew the certainty of the thing, in which the disturbance is alledged: as, in an action upon the case for stopping his way, it ought to alledge the *terminus ad quem* the way goes. *R. after verdict, 1 Brownl. 6. Yel. 164.*

And likewise the *terminus a quo*. *Yel. 164. Vide in Chimin, (D. 2.)*

And whether it be a foot-way, horse-way, or cart-way. *Yel. 164.*

So, if the plaintiff alledge a way in *pecia passura*, it is bad for the uncertainty. *R. after verdict, Lut. 124.*

So,

So, if the plaintiff prescribe for a way to such a close, he must shew a title to the close. *Lut.* 160.

Otherwise, if the way claimed be to a high-street.

Or, to a common field. *R. Lut.* 160.

So, if he alledge a prescription, he must shew a seisin in fee in *B.* to the close to which, &c. and derive a title under *B.* for it is not sufficient to shew a particular estate, without saying, from whom it is derived. *Mod. Ca.* 4.

So, if a parishioner alledge a disturbance of his entry into the vestry-room, he must shew, that he had a right to enter there. *R. 2 Mod. Ca.* 354.

(B. 2.) The Plea, &c.

To an action upon the case for a disturbance, the defendant shall plead the general issue, *not guilty.* *Lut.* 125, 6.

So the defendant may plead, *that he put his cattle there as lord, or by the leave of the lord of the manor.* *2 Mod.* 6.

And he must alledge, *that the plaintiff hath sufficient common.* *Ibid.*

So, for a disturbance in a common, he may plead specially, *that the defendant, or such an one under whom the defendant claims, has common there.* *Lut.* 103.

And, if the action be for surcharging the common, the plaintiff may traverse the sufficiency of the common. *R. Lut.* 107.

Otherwise, if the action be for a disturbance, whereby he has it not in *ram amplo modo.* *Ibid.*

But the defendant cannot plead, *that being lord of the manor he dug there for coal, &c.* for if it be a good plea, it amounts to the general issue, *not guilty.* *R. 1 Sid.* 106. *Vide in Pleader, (E. 14.)*

That he erected a bridge in the place of a ferry. *R. 3 Mod.* 294. *Vide 1 Sal.* 12.

So, for a disturbance in a way, the defendant may plead, *not guilty.*

Or, *that A. had a right to a way there, and the defendant used it as servant to him.* *Lut.* 112.

To which the plaintiff may reply, *that the way was used to other land.* *Lut.* 113.

So if the plaintiff claim a way for necessity, the defendant may plead, *that the plaintiff has another convenient way.* *R. Mod. Ca.* 4.

Otherwise, where he claims by grant, or prescription. *Mod. Ca.* 4. (a)

In an action for disturbance in a seat in a church, it is not sufficient to say by the plea, *that A. lord of the manor was seised*

(a) In all the cases above mentioned, except the erection of a bridge, and the way of necessity, the general issue seems to be the proper plea, under which the whole merits may be tried, and most of the special pleas above stated amount to the general issue. As to the erection of a bridge instead of a ferry, it is conceived not to be a legal plea. *1 Morg. Vod. Mes.* 257.

ACTION upon the Case for Disturbance.

of the chancel, isle, &c. where the seat is, and by his command the defendant sat there, which is the same disturbance; for the freehold of the church cannot be in the lord. *R. Bridge, 5. Vide ante, (A. 3.)*

ACTION upon the Case for Mifeasance.

(A) When it lies.

(A. 1.) For Mifeasance in an Officer.

Vide Action upon the Case for Deceit, (A. 6.) For Negligence, (A. 2.)

SO an action upon the case lies for mifeasance: as, if an officer misdemean himself in his office by any falsity; *de quo vide Action upon the Case for Deceit, (A. 6.)*

Or, otherwise misbehave himself in his office; as, if a sheriff imbezil a writ delivered to him. *1 Rol. 93. l. 11. 2 Inst. 451.*

[If an officer remove goods, taken in execution, off the premises before the landlord is paid a year's rent, pursuant to *8 Ann. c. 17. Palgrave v. Wendham, M. 6 G. Str. 212.* *And notice that the rent has not been paid shall be presumed after verdict, and the action lies by an administrator.*]

Or, return too small issues. *1 Rol. 93. l. 45. Vide 2 Inst. 452.*

Or, return a juror, who shewed him his charter of exemption, and delivered him the writ *de allocando*. *2 Inst. 130.*

So, if a prothonotary of *C. B.* award a *supersedeas* irregularly, to process upon which *A.* is arrested at the suit of another. *Semb. Lut. 96.*

So, if the mayor of *London*, at the election of a bridge-master, refuse a poll, where by custom it ought to be granted, *per quod* the plaintiff lost his office. *Per three J. et aff. in error per tot. cur. 1 Vent. 206. 2 Vent. 25. 2 Lev. 50.*

If a mayor refuse the vote of a freeman, at the election of a new mayor. *Semb. 2 Lev. 250.*

So, if a mayor at the election of a burghers for parliament, refuse the vote of a freeman. *Cont. per three J. but Holt acc. and the judgment was reversed in parliament, between Ashby and White, Mod. Ca. 45. 1 Sal. 20. Vide Action upon the Case, (B. 8.)*

So, if a justice of peace refuse an examination upon the *stat. 27 Eliz.* after a robbery; for it is only ministerial, and not judicial. *Semb. 1 Leo. 323. Vide Hundred, (C. 4.)*

If a judge of an inferior court proceed to judgment, and execution, after an *habeas corpus* delivered to him. *R. 3 Leo. 99.*

For neglect in an officer, *Vide Action upon the Case for Negligence, (A. 2.)*

(A. 2.)

(A. 2.) In any Perfon, contrary to the Obligation of the Law.

So an action upon the cafe lies for mifseafance in any perfon, contrary to the obligation of the law: as if tenant by ftatute-merchant cut down timber trees, the value may be recovered in a *feire facias ad computandum*; but for the damage over and above the value of the trees, an action lies by him in the reverfion. 1 *Rol.* 103. l. 35.

If the lord of a manor cut down timber growing upon copyholds within a manor, where the copyholders prefcribe to have the toppings, tho' the lord takes only the bodies. *R.* 1 *Rol.* 108. l. 10. *Vide Copyhold* (K. 7.)

So it lies by a copyholder againft a ftranger, that cuts down his trees. 3 *Lev.* 131.

If a copyholder for life commit wafte, an action upon the cafe lies by him in the remainder. *Dub.* 3 *Lev.* 131. *Vide in Copyhold*, (K. 7.) *Vide poft.* (A. 6.)

If an under-leffee take planks, &c. fixed to the freehold, an action upon the cafe lies againft him by the firft leffee. *R.* *Jon.* 224.

So, if a leffee for life, or years, commit wafte, the leffor may waive his action for the wafte, and have an action upon the cafe. 3 *Lev.* 131.

So, the lord of a manor may have an action upon the cafe againft a ftranger, who cuts down trees upon a tenement of his copyholder for the prejudice of his inheritance. 3 *Lev.* 131.

So a reverfioner, (as well as a leffee for years in refpect of his poffeffion,) may have an action upon the cafe for furrouring his land, whereby his trees became corrupt and putrid, for the prejudice to his inheritance. *R.* 3 *Lev.* 209.

Or, for an houfe built, or other prejudice to his inheritance. 3 *Lev.* 131.

So, if a man enter upon the king's farmer, and take the profits, *per quod* the farmer cannot pay his rent. 1 *Rol.* 106. l. 2.

So, if the king grant the fole manufacture of fuch a commodity, (fuppoſing the grant good,) an action upon the cafe lies by the grantee againft any other, who manufactures it. 1 *Rol.* 106. l. 15.

If the lord of a manor feize goods as waife, eſtray, &c. an action upon the cafe lies for mifufing of them, if there was freſh ſuit; or it was within a year. *R.* 3 *Leo.* 192, 3. *Vide in Waife*, (A. 2.—F.)

If the owner of a ferry extort toll for paſſage not due. *Carth.* 194.

(A. 3.) Contrary to his Undertaking.

So an action upon the cafe lies, if any one act contrary to his *Vide Action* undertaking: as if goods are delivered to another to keep them *upon the Cafe* fafely, he undertakes to keep them againft all events; and there-
for a Deceit.
 fore, (A. 5.)
For Negli-
gence, (A. 4.)

fore, if they are lost or stolen, he shall answer for them. *Co. Lit.* 89. a. *R. 4 Co.* 83. b. *Cro. El.* 815. If there was a voluntary default in him, and not otherwise; *per Holt between Coggs and Bernard*, in *B. R. Pasch. 2 Ann.* (reported *Comyns's Reports* 133, 135.)

So, if they are delivered to him generally, to keep; for, to keep, and, to keep safely, are all one. *Co. Lit.* 89. a. 4 *Co.* 83. b. *Cont. per Holt et curiam, Pasch. 2 Ann. between Coggs and Bernard*; for he is bound only to keep them as his own. (reported *Comyns's Reports* 133, 134, 135.)

Otherwise, if they are delivered to be kept as his own goods; for there he shall not answer for them, if they are stolen. *Co. Lit.* 89. a. 4 *Co.* 83. b.

Or, if they are delivered as a pledge, and are stolen before the money tendered. *Co. Lit.* 89. a. 4 *Co.* 83. b.

Cont. if they are stolen after a tender. 29 *Aff. pl.* 28. *Ca. Lit.* 89. a. 4 *Co.* 83. b.

Or, if they are delivered in a chest, of which the bailor has the key; tho' the chest be stolen the bailee shall not answer; for he had not the full trust of it. *Co. Lit.* 89. b. 4 *Co.* 83. b.

And in these cases the bailee shall not be charged upon a stealing, tho' there was a neglect in him; as, if he did not shut the door, &c. for he is not bound to keep them with more care than he does his own. *Per cur. Pasch. 2 Ann. B. R. between Coggs and Bernard.* (reported *Comyns's Reports* 133, 134, 135.)

So, if any one undertake to carry goods, &c. for others, and they miscarry, or are lost by his default, an action upon the case lies against him. *R. Pasch. 2 Ann. B. R. between Coggs and Bernard.* 1 *Sal.* 26. (reported *Comyns's Reports* 133.)

Tho' he carry them without hire; for he undertakes to carry them, and therefore ought, at his peril. *Vide Coggs and Bernard.* (reported *Comyns's Reports* 133, 136.) *Sal.* 26.

So, if any one lends a horse, or other thing for hire, and the person misuses it, an action upon the case lies against him. *Lut.* 98. *R. 2 Leo.* 104.

Or, if he undertakes to keep it safely, and it is stolen. *Dub. Mo.* 543.

[If plaintiff declares upon a special contract, he must prove the contract as laid; therefore if plaintiff declares, that in consideration of his undertaking to pay defendant what he should deserve, defendant undertook to repair his house, which he has done so ill that the rain beat in, &c. and he proves that it was an insurance office that employed defendant to repair for a sum certain, it does not support it, and he shall be nonsuited. *Witherington v. Buckland*, *T. 9 G. 2. B. R. H.* 309.

(A. 4.) And an Action lies for Misfeasance, tho' the Damage happen by Misadventure.

Tho' the misfeasance be by misadventure: as, if a man shoot with a gun at a bird, and thereby lights a fire which consumes the house of another. *R. Cro. El.* 10.

So, if a lessee for years permit his house to be consumed by fire. *Per two J. Cro. El. (461.)* but there was no judgment, *ut dicitur. Cro. El. 777. Vide Action upon the Case for Negligence, (A. 3.)*

(A. 5.) In Contempt of the Process of the Law.

So an action upon the case lies for misfeasance in contempt of the process of the law; as, if a man proceed in the Admiralty, or Spiritual Court, &c. after a prohibition delivered, (when a prohibition lies.) *1 Rol. 109. l. 15.*

So, if a sheriff permit an escape. *Vide Action upon the Case for Negligence, (A. 2.)*

So, if a prisoner escape, whereby the sheriff is charged, an action upon the case lies by the sheriff against the prisoner. *D. 3 Co. 52. b. Mo. 660. R. Mo. 597. Cro. El. 237. Adm. Lut. 64.*

So, if a gaoler permit a voluntary escape, an action lies against him. *1 Sal. 18.*

So, if a man make rescue of a person arrested upon mesne, or judicial process. *R. 2 Cro. 419. R. 2 Cro. 486. R. Cro. Car. 109. Vide in Rescous, (D. 2.)*

Or, of goods taken in execution.

Or, of goods distrained for rent, or other duty, or *damage-feasant. F. N. B. 101, 102. Reg. 117.*

And a *rescous* to the servant is a *rescous* to the sheriff himself. *39 H. 6. 42. a.*

And the action lies by the party to the suit, in which the arrest was. *R. 2 Cro. 486. Cro. Car. 109. 2 Rol. 556. l. 25. 35.*

Or, by the sheriff.

(A. 6.) For a malicious Misfeasance.

So an action upon the case lies for any malicious act to the damage of another; as, if a man pulls down tiles, or the wall of a house, whereby the timber is rotted, or corrupted. *R. 1 Rol. 104. l. 5.*

If a man lie in wait to take another for his villein. *1 Rol. 107. l. 50.*

If he threaten the tenants of another, whereby they depart from their tenures. *1 Rol. 108. l. 2.*

If he tear off the seal of a deed; and it is not necessary to shew, that it was the seal of the party, or, that the deed thereby lost its force. *R. 2 Cro. 255.*

If he threaten the workmen, and customers that come to his stone-pit, whereby he loses the profit of it. *R. 2 Cro. 567. 2 Rol. 162. Dan. 201.*

If a man, who was permitted to occupy a house, pull down or deface the windows. *R. Cro. Car. 187.*

So a lessor may maintain an action upon the case against the lessee for waste done, and need not bring an action of waste. *Per Pemberton, 3 Lew. 131. Vide ante, (A. 2.) Vide Action upon the Case for Negligence. (A. 3.)*

So, he who has the reversion, or remainder in fee of a copyhold, against the tenant for life of the same land, if he cuts down timber. *Dub.* 3 *Lew.* 131. *Vide Copyhold*, (K. 7.) *Vide ante*, (A. 2.)

So, if a stranger hinder the lessor from entering upon the land to view, whether waste be committed. *R.* 1 *Roll.* 109. l. 5.

If a parson permit his tithes after notice to lie upon the land to the prejudice of the owner, unless he hinders the removal. *R.* 1 *Roll.* 109. l. 30, 35. *Lat.* 8.

So, if the owner hinder the parson from carrying off his tithes. 2 *Inst.* 650.

So, if a parishioner by custom ought to deliver to the parson so many cheeses in lieu of tithe milk, and he tender them to the parson, who refuses them, and permits them to remain at his house, whereby his house is damaged; an action lies against the parson. *Semb. Godb.* 329. *Pal.* 341. *Ley.* 69. 2 *Roll.* 328.

If a parson, &c. remove a grave-stone, or coat-armour of one deceased, out of the church. *Godb.* 200.

So, if a man entice a servant, or apprentice out of another's service. 2 *Roll.* 556. l. 20.

Or, retain him, knowing that he departed without licence. *R.* 2 *Lew.* 63. *Semb.* 1 *Leo.* 240.

So, if a man *malitiose* take a false oath before a committee, whereby the plaintiff is damaged; but whether it lies before a conviction for this. *Dub.* 1 *Sid.* 50.

If a man *malitiose* claim a woman to be his wife, whereby she loses her marriage. *R.* 1 *Sid.* 79, 80. 1 *Lew.* 53.

If a man make a false *affidavit*, and petition the commissioners of the customs upon it, whereby another loses his office. *R.* 1 *Lew.* 119.

[For falsely and maliciously suing out commission of bankrupt against plaintiff, which is superseded, case lies notwithstanding the remedy given by stat. *Chapman v. Pickersgill*, M. 3 G. 3. 2 *Will.* 145.]

(B) When it does not lie.

BUT an action upon the case does not lie for riding Skimmington, &c. whereby the plaintiff is disgraced. *R.* *Ray.* 401. 1 *Vent.* 348.

So, an action upon the case does not lie, where a man has not sufficient notice of his duty.

As, if a sheriff return a juror, who shewed him a charter of exemption, if he had not the writ *de allocando*; for the sheriff cannot make a judgment of the validity of the charter. 2 *Inst.* 130.

As to the declaration, and plea in an action upon the case for misfeasance. *Vide in Pleader.* (2 O.)

Vide more concerning mifeafance, or mifdemeanor; *Leet*, (L. 2, &c.)—*Officer*, (K. 3.)—*Parliament*, (G. 3.—L. 34, 35, 44.)—*Prerogative*, (D. 54.)—*Viscount*, (D. 2.)

For mifdemeanor, in an attorney. *Vide Attorney*, (B. 15.)

_____ in a coroner. *Vide Officer*, (G. 14, 15.)

_____ in a judge or officers. *Vide in Courts*, (P. 16.)

—*Officer*, (K. 3.)

_____ in a jury, or party. *Vide Pleader*, (S. 46, 47.)

_____ in labourers, and fervants. *Vide Juftices of Peace*, (B. 52, 62.)

ACTION upon the Cafe for Negligence.

(A) When it lies.

(A. 1.) For Negligence in a Man's Truft.

SO an action upon the cafe lies for a negligence in a man's duty, tho' it be a nonfeafance; as if, by the negligence of a fervant, cattle perifh. 1 *Rol.* 105. l. 32. *Vide Action upon the Cafe for Deceit*, (A. 5.)

(A. 2.) In his Office.

So it lies againft an officer for neglect of the duty of his office; as, if a fheriff do not return a writ. 1 *Rol.* 93. l. 11, 20. *Vide Action upon the Cafe for Deceit*, (A. 6.)

Do not levy *expensas militis*. 1 *Rol.* 93. l. 42.

Do not fummon the tenant in a real action, whereby he lofes by default. 1 *Rol.* 105. l. 45. *Vide Action upon the Cafe for Deceit*, (A. 1.)

Will not execute a writ of feifin. 2 *Vent.* 26.

Or, return a writ *de coronatore eligendo*. 2 *Vent.* 26.

So, if he do not deliver to the new fheriff a *superfedeas*, &c. by reafon of which the plaintiff is taken in execution *de novo*. 1 *Mod.* 222. 2 *Mod.* 217.

So, if an officer, whose bufinefs it is, refufe to enroll a deed within the fix months. *R.* 1 *Rol.* 108. l. 42.

If an archdeacon will not induct a clerk admitted and inftituted. *R.* 1 *Rol.* 108. l. 50.

If an ordinary admit the clerk of another patron, contrary to a verdict in a *jure patronatus*. 2 *Vent.* 26.

If he do not take caution of a perfon excommunicated, before he be affoiled, if it be required. *D. Ray.* 226.

So, if a mayor at the election of a bridge-mafter refufe a poll, which is ufual, and return another elected. *Per three J. and affirmed in error, per tot. cur'* 1 *Vent.* 206. 2 *Vent.* 25. 2 *Lev.* 50. *Vide Action upon the Cafe for Mifeafance*, (A. 1.) **Vide etiam flat.* 11 G. 1. c. 18. for regulating elections in the city of London.*

If a lord in ancient demefne refufe to hold his court. 1 *Rol.* 108. l. 15. *Vide Action upon the Cafe*, (B. 18.)

If the chief magistrate of a borough refuse the vote of him, who has a right. *Cont. per three J. Holt. acc. in B. R.* but this judgment was in the House of Peers reversed by fifty peers, and all the other judges, except Trevor and Price, and sixteen peers. 1 Sal. 20. *Vide Action upon the Case, (B. 8.) Vide Action upon the case for Misfeasance, (A. 1.)*

So, if a sheriff, &c. permit an escape upon mesne or judicial process, an action upon the case lies against him by the common law. 2 Inst. 382. R. 1 Rol. 99. l. 10, 15. 2 Cro. 289. Lut. 71, 129.

So, if he permit a *rescous* upon judicial process. R. Mar. 1. R. 3 Lev. 46. *Vide Action upon the Case for Misfeasance (A. 5.)*

Otherwise if the *rescous* be upon mesne process. Mar. 1. R. 3 Lev. 46. (a)

So, if he permit the escape of a man committed by the commissioners of bankrupt, Lut. 123.

Or, of a man taken upon an *excommunicato capiendo*. R. Lut. 123.

Or, taken upon a *capias utlagatum* before or after judgment. Lat. 109, 111.

So, if the post-master permit letters with *Exchequer* bills inclosed to be opened, and imbezzled by his servants in his house; for by the *stat. 12 Car. 2. 35.* he is intrusted with the receipt and dispatch of letters. *Cont. per three J. but Holt acc. Pasch. 13 W. 3. Lane against Cotton and Franklin, B. R. Rot. 401. Sal. 17, 441. Carth. 487. (reported Comyns's Reports, 100.)*
Vide Cowper 754. contra.

Otherwise, if they miscarry upon the road. *Semb. per Holt, Sal. 17. (Vide Comyns's Reports 104.)*

So, if a *custos brevium* keep records in his office *tam negligenter* that they are altered; tho' they do not appear to be so by his consent, and attornies have always recourse to the records there. *Semb. per two J. Twissd. cont. 1 Lev. 64.*

So, in every case where an officer is intrusted by the common law, or by statute, an action lies against him for a neglect of the duty of his office. *Per Holt, 1 Sal. 18.*

So, an officer shall be responsible for a neglect in his servants. *Per Holt, 1 Sal. 17, 18. Vide Action upon the Case for Deceit, (B.)*

So, for every fraud, or neglect in the execution of his office. Lat. 187.

But, a sheriff shall not be indicted, or imprisoned for the fault of the under-sheriff. Lat. 187.

(A. 3.) For a Neglect in doing that, which by Law he ought to do.

So, it lies against him, who neglects to do that, which by law he ought to do: as, if a man is bound by prescription to pay

(a) The reason of the distinction is, that on judicial process he may take the *posse comitatus* but on mesne process he cannot,

toll

roll, and refuses the payment. *R. 1 Rol. 103. l. ult. 106. l. 37. Dub. 3 Lev. 400.*

Or, to provide beer for the beadle of the hundred, and does not do it. *1 Rol. 106. l. 35.*

So, if the parson is bound by prescription to find a bull, and a boar yearly for the increase of the cattle within his parish, and does not do it. *R. 1 Rol. 109. l. 20. Mo. 355. 4 Mo. 241. Cro. El. 569.*

But it does not lie, unless the plaintiff shew a prescription for it. *R. 4 Mod. 241. Skin. 399.*

And a consideration for such prescription; as, that the parson has an increase in his tithes, &c. *4 Mod. 241. Vide 1 Rol. 109. l. 20.*

So, if a man bound by prescription to grind at a mill all grain *tritural* spent in his house in the same town, do not grind there. *Adm. Hob. 189. 2 Sand. 116. R. 2 Bul. 196. Vide 1 Vent. 167.*

But a prescription is not good, for all corn fold, or used in his house. *R. Hob. 189. Mo. 887.*

Nor, for all corn used in his house; for then he cannot use any not ground. *R. 2 Saund. 117. 2 Lev. 27.*

Nor, for all corn used, or sold by the defendant. *R. Mo. 887. Dub. Hard. 67.*

So, if two join, as they may, for not grinding at the one or the other mill, it is not well to say, *quod molire debent* at those two mills, or one of them; but they must say, that all corn not ground at the one, ought to be ground at the other. *R. 2 Lev. 27.*

So, if a man, bound by prescription to repair fences against another, does not do it; whereby the cattle of the other perish. *R. 1 Vent. 265.*

Or, whereby cattle enter, and do damage. *1 Rol. 105. l. 50. R. 1 Sal. 335.*

So, if bound to the repair of a bridge, by the neglect whereof *A.* has a special damage. *3 Lev. 400. 11 H. 4. 82. b.*

Or, bound to repair a bank, does not do it, whereby the land of another is surrounded. *1 Rol. 105. l. 52.*

If a man who has the upper room of a house does not repair it, to the damage of him, who has the under room. *Dah. 200. pl. 20. Per two J. Kel. 98. b. Dub. Sal. 361.*

So, if he, who has the under room, does not under-pin and support it. *Dan. 200. pl. 21. Per two J. Kel. 98. b.*

If a man does not repair the wall of his house, whereby his privy annoys his neighbour. *R. 1 Sal. 22, 360.*

So, if a parson does not repair his parsonage, an action lies by his successor for dilapidations. *R. 3 Lev. 268. Lut. 116, 7.* And if he be afterwards sued in the Spiritual Court, a prohibition lies. *R. 3 Lev. 413.*

If a parson does not remove tithes set out within a convenient time after notice and request. *Vide Action upon the Case for Misfeasance, (A. 6.)*

ACTION upon the Case for Negligence.

So, if an under-lessee for years permit his house to be burnt, an action upon the case lies against him. 4 *Mod.* 12. *R. Cro. El.* (461,) 777. *Sho.* 315. *Henn. Plead.* 161. *Vide Action upon the Case for Misfeasance, (A. 6.)*

So, if an under-lessee at will permit waste. *R. Cro. Car.* 187. *Jon.* 224.

So, where by custom a man is obliged to do a thing, if he does it not, an action upon the case lies.

As, where by the custom of the realm the major part of part-owners bind the whole, if the greater number of part-owners in a ship agree to a voyage, and the others dissent, an action upon the case lies against the dissentients. *Per Holt, Carth.* 26, 27.

If, by custom, every inhabitant of an antient tenement in such a town ought to bake at one bake-house there, an action upon the case lies against him, who does not do so. *R. 2 Bul.* 195.

If a man having a common ferry by prescription, do not repair it. *Vide Hard.* 163.

But it does not lie for not maintaining a ferry, without a special damage, any more than for a common nuisance. *R. Carth.* 193. *Vide Action upon the Case for a Nuisance, (C.)*

(A. 4.) For a Neglect to do that, which he has undertaken.

Vide Action upon the Case for Misfeasance, (A. 3.)

So, if a man neglect to do that which he has undertaken to do, an action upon the cases lies: as if any one, who is not a common carrier, undertake to carry goods, and deliver them at such a place; if he does not carry them, an action upon the case lies. *R. 2 Cro.* 262.

Tho' the plaintiff do not agree for a price certain, but says, he will content him. 2 *Cro.* 262.

So, if a man lend his horse, or other profitable cattle to another *gratis*, he is bound to a strict care; and therefore, if he neglect to take due care of it, an action upon the case lies; as, if he do not shut the stable, and it is stolen. *Per cur. Pasch. 2 Ann. between Coggs and Bernard. (reported Comyns's Reports 135.)*

Otherwise, if it be stolen without his default, or any neglect. *Between Coggs and Bernard, (reported Comyns's Reports 135.)*

But, if there be not any neglect in the defendant, an action upon the case does not lie against him, tho' he do not perform his undertaking; as if he be disabled by the act of God; as, if a man promise to re-deliver a horse upon request, and the horse dies, without his fault, before a request. *R. Jon.* 179. **Vide post. (C. 1.)* *

As to declarations, and pleas in the above actions upon the case for negligence. *Vide Fleader, (2 P. 1.)*

(A. 5.)

(A. 5.) For a Neglect in taking Care of his Dog, Horfe, Cattle, &c.

So an action upon the case lies for a neglect in taking care of his cattle, dog, &c. As if a man ride an unruly horfe in *Lincoln's Inn Fields*, (or other publick place of resort,) to tame him, and he break loose, and strike the plaintiff. *R. 1 Vent. 295. 2 Lev. 172.*

And it lies against the master, and servant, tho' the master was absent; for it shall be intended, that the servant did it by order of his master. *R. 2 Lev. 172.*

So it lies, if a man permit a mad bull to go at large, knowing he was mad, whereby the plaintiff is gored. *Semb. Lut. 90. D. 1 Vent. 295.*

Otherwise, if the declaration do not alledge, that the defendant knew it. *R. after verdict, Lut. 90. Vide Sal. 662.*

So it lies, if a man keep a dog, knowing him *ad mordendum oves consuetum qui oves momordit, per quod interierunt.* *R. Cro. Car. 487. Dy. 25. b.*

And it is sufficient to say, *canem ad mordendum consuetum scienter retinuit*, as well as *sciens canem, &c. retinuit*; for *scienter* refers to the whole, and is not traversable, but ought to be proved in evidence. *R. cont. Cro. Car. 487. but acc. 1 Rol. 4. l. 40. R. 1 Sid. 127.*

So it lies, if he keep a dog, *sciens ad mordendum porcos consuetum*, if he *momordit porcos, per quod interierunt.* *R. Cro. Car. 254.*

[So, if a dog has once bit a man, and the owner, having notice, keeps him and lets him go about or lie at his door, action lies against him by a person bit, tho' it happened by his treading on the dog's toes. *Smith v. Pelab, H. 20 G. 2. Str. 1264.*]

So, if he keep a boar, *sciens ad mordendum animalia consuetum.* *R. 2 Sal. 662.*

So it lies, if a soldier, in training, discharge his musquet, and *casualiter et contra voluntatem* wound another. *R. Hob. 134.*

Otherwise, if he shews that it was by inevitable necessity, and without his fault. *Hob. 134.*

If the king's collector discharge his pistol to avoid mischief, and the plaintiff *casualiter* passes by, and is wounded *contra voluntatem.* *R. 2 Jon. 205.*

But if a man has a tame fox, which escapes and becomes wild, and does mischief, the owner shall not answer for the damage done afterwards. *Per Twissd. 1 Vent. 295.*

If a dog chafes sheep, &c. without setting on, or notice before to the master, an action does not lie. *Lat. 119. Dy. 25. b. 29. a.*

So, if a master set on his dog, to chase sheep out of his land, and the dog pursue them into another's land, and the master recall his dog, *quam cito vidisset*, an action does not lie. *R. Lat. 119.*

ACTION upon the Case for Negligence.

Sh an action upon the case does not lie, for the negligent keeping of another's goods. *R. Sav.* 74.

As to the declaration, and pleading in this action, *Vide in Pleader*, (2 P. 2.)

(A. 6.) In keeping his Fire.

So an action upon the case lies upon the general custom of the realm against the master of an house, if a fire be kindled there, and consume the house or goods of another. *2 H.* 4. 18. *1 Rol.* 1 B.

So, if a fire be kindled in a yard or close to burn stubble, and by negligence it burns corn, &c. in an adjoining close. *R. 9 W.* 3. *B. R. between Turberville and Stamp.* *Skin.* 681. *1 Sal.* 13. (*reported Comyns's Reports* 32.)

So, if a fire be kindled by a candle, or other accident.

So, if a fire be kindled (the master not knowing it) by a servant, guest, or any other, that enters his house by his consent. *1 Rol.* 1. *l.* 25. *Acc. Skin.* 681.

And an action lies by a lessor for damages to his inheritance, tho' there be a lease *in esse* of the house burnt. *R.* 3 *Lev.* 359, 360. *1 Sal.* 13, 19.

So it lies by the lessor against his lessee for years, if he shew the reversion to be in him. *R.* 1 *Sal.* 13.

So, if the lessee for years demise to *B.* at will, it lies by the lessor against *B.* *R.* 1 *Sal.* 19.

Or, by the lessee for years; for he is answerable to his lessor. *Ibid.*

So it lies by a stranger against *B.* if his house be burnt by the fire of *B.* *R.* 1 *Sal.* 19. 3 *Lev.* 359.

But the action lies only against *patrem familias*, not against his wife or servant. *R.* 1 *Car.* 1 *Rol.* 2. *l.* 5.

And it lies not, when the fire is kindled by a stranger, who enters his house against his will. *1 Rol.* 1. *l.* 32.

So it lies not, if it appears that a fire, lighted for the burning of stubble, &c. by a sudden wind, or other inevitable accident, without the fault of the defendant or his servants, burns the clothes of another. *Semb. per cur. between Turberville and Stamp.* *M.* 9 *W.* 3. (*reported Comyns's Reports* 32.) *Vide* 1 *Sal.* 13.

So it lies not upon the custom of the realm, if a man shoot a gun at a fowl, and thereby light a fire which burns the house of another. *Semb. Cro. El.* 10.

Yet an action upon the case lies generally. *Cro. El.* 10. *Vide Action upon the Case for Misfeasance*, (A. 4.)

So it does not lie by a lessor in fee against his tenant at will for negligently keeping his fire, whereby his house is burnt. *R.* 1 *Sal.* 19. 3 *Lev.* 359. *Vide Estates*, (H. 5.) *Vide Action upon the Case*, (B. 3.)

And now by the *St. 6 Ann.* 31. no action shall lie against any person, in whose house or chamber any fire accidentally begins,

nor

nor any recompence be made by him for any damage occasioned thereby; which act continued three years, and by the *St. 10 Ann. 14.* was made perpetual.

If the declaration say, *quod cum secundum legem et consuetudinem, &c.* it is sufficient; without saying, *de tempore cujus contrarium, &c.* for the common custom of the realm is the common law. *Per tot Cur. 2 H. 4. 18. a.*

So, if it say, *ignem suum improvide custodivit*, it is good, tho' a man has no property in fire. *R. 2 H. 4. 18. a.*

And, *ne damnum alicui eveniat* is as well as, *alicui vicino*. *R. 3 Lev. 359.*

Per quod domus fuit combusta. viz. in pariet. ornament. &c. tho' the words after the *videlicet* are uncertain. *R. 5 Mod. 181.*

As to more of declaration, and pleading in this action, *Vide in Pleader, (2 P. 3.)*

(B) Action against a common Innkeeper.

(B. 1.) When it lies.

SO an action upon the case lies upon the common custom of the realm against a common innkeeper, if the goods of his guest are stolen or lost by the negligence of him or his servants. *R. 1 Rol. 2. l. 35, 47. 8 Co. 32. Calye. Dy. 266. b. in marg.*

A man who continues for a week, or more, in term, is a guest. *Dy. 158. b. in marg.*

Soldiers quartered there for fourteen days are guests. *Per Whitfield 1647.*

And an innkeeper is chargeable for deeds, obligations, and all other moveable goods. *8 Co. 33. a.*

Tho' the guest has the key of his chamber delivered to him, and does not shut the door of his chamber. *11 H. 4. 45. Bro. act upon the case 15. 8 Co. 33. a.*

Or, if the guest goes to view the town for any time. *R. 2 Cro. 189.*

Or, goes out, and says that he will return at night. *Dy. 158. b. in marg. 2 Cro. 189. Mo. 877.*

Or is absent for two or three days, if the goods are beneficial to the innkeeper in the mean time; as an horse, &c. *Per Cur. 1 Rol. 3. l. 20. 2 Cro. 189. Lat. 127. Cont. per Dodd. Lat. 88. R. Mo. 877.*

So it lies, tho' the guest stays for a week or more. *D. cont. Lat. 88. acc. Lat. 127.*

So it lies, tho' the goods are put by the innkeeper out of his inn; as, if a horse be put into a pasture, without the direction of the owner. *R. 8 Co. 32. b. 1 Rol. 4. l. 7.*

Or, by his direction, and there lost by the fault of the innkeeper or his servants, who leave the gate open. *Per Popb. 1 Rol. 4. l. 10.*

So it lies, tho' the innkeeper be of *non sane* memory, and the guest knows it. *R. 1 Rol. 2. l. 40. Cro. El. 622.*

Or,

Or, be an infant. *Cont. 1 Rol. 2. l. 43.*

Or, absent; for his servants ought to have the care of his guests in his absence. *11 H. 4. 45. 1 Rol. 4. l. 25.*

Tho' the absence be by action of law. *Cont. 11 H. 4. 45. Semb. acc. 1 Rol. 4. l. 30.*

So it lies, tho' the innkeeper do not know any of the robbers. *8 Co. 33. a.*

The master may have an action for goods lost at an inn, where his servant was a guest. *1 Rol. 3. l. 40. R. Lat. 127. R. 2 Cro. 224. Yel. 162. Dal. 8. Dy. 158. b. in marg.*

So, if his friend, who carries money for him, be the guest, *Semb. Yel. 162.*

So, if a common carrier be robbed in an inn, wherein he is a guest, the owner shall have the action. *Per two J. Dal. 8.*

Declaration.

The declaration must say, that the defendant has *commune hospitium*, but it need not be said in the writ. *Dy. 266. b. 8 Co. 32. b. 11 H. 4. 45.*

And, if the custom be alledged for a common inn, and then it is said, that the plaintiff *hospitatus fuit in hospitio defend.* without saying, *in communi hospitio*, it is sufficient after verdict. *R. Hob. 245.*

And a mis-recital of the custom does not hurt; for it is the common law. *Lat. 127.*

And therefore, if the plaintiff alledge, that the defendant ought to keep the goods of his guests, *et omnium aliorum subditorum* brought into his inn, it is good; for sufficient is alledged to maintain his action. *R. 2 Cro. 224.*

(B. 2.) When not.

But an action does not lie, if it be not a common inn: as, if a man lose goods, who lodges at a private house. *8 Co. 32. a. 1 Rol. 2. l. 35. R. 2 H. 4. 7. b.*

Or, who has a lodging assigned him *per hospitorem domini regis.* *1 Rol. 2. l. 47. Dy. 158. b. in marg.*

So, it does not lie, if a man hire a chamber in an inn for the term; for he is a lessee. *R. Mo. 877.*

So it lies not, if a man be at a common inn as a friend, or a neighbour, not as a guest. *R. 1 Rol. 3. l. 25. 8 Co. 32. b.*

Or, if a man be a guest, but deliver goods to the innkeeper upon another account. *1 Rol. 3. l. 5.*

Or, leave goods there, and is absent for two or three days, and they are lost in his absence, when the innkeeper had no benefit by them in his absence. *R. 1 Rol. 3. l. 10. 2 Cro. 189. Mo. 877. Noy 126. Lat. 127.*

So, it does not lie, if the goods are lost without any fault of the inn-keeper; as, if the guest order his horse to be put to pasture, and he is lost there, without any neglect in the innkeeper. *R. 8 Co. 32. b. 1 Rol. 4. l. 2.*

If the guest be robbed by his own servant, or companion. *8 Co. 33. a.*

Or,

Or, by any one, whom the guest desires to be lodged with him. *Ibid.*

Or, if the innkeeper is desirous of locking up the goods, saying, that he cannot otherwise warrant them, and the guest refuses. *Per cur. Dy. 266. b.*

So, if the innkeeper says, that his house is full, and the guest offers to be lodged among the other guests; for an action lies for the refusal, if the inn be not full. *Per cur. Dy. 158. b. 1 Rol. 3. l. 45. 4. l. 19. 1 And. 29. Bend. 60.*

So, if the innkeeper say, that he is obliged to be absent, and cannot take care of his goods. *11 H. 4. 45. Semb. cont. 1 Rol. 4. l. 30.*

So, if the inn be broke open by the king's enemies. *Pl. Com. 9. b.*

As to pleas in this action. *Vide Pleader, (2 Q.)*

(B. 3.) When an Innkeeper shall detain a Horse for his Eating.

If a horse be sent to a common inn by a guest, the innkeeper may detain him, 'till he is paid for his eating, by the custom of London; and he has the horse as a distrefs until payment.

So, by the common custom of the realm. *2 Rol. 438.*

[But an innkeeper cannot sell the guest's horse, for keeping, except in London. *Jones v. Pearle, T. 9 G. Str. 556.*]

So, if an horse be sent to a common inn by the owner. *R. 1 Rol. 449.*

Or, if the owner agree, that the innkeeper shall detain him till he is paid. *2 Rol. 438.*

So if an horse be sent to a common inn by a stranger. *Per Dod. but three J. Semb. cont. 1 Rol. 449.*

[But if the horse is once out, he cannot detain him for what was due before, on his coming in again. *Jones v. Pearle, T. 9 G. Str. 556.*]

And tho' the owner direct that his horse shall not have any more food, he shall pay for it afterwards, otherwise the innkeeper will lose the horse, which is his security. *Per Holt, Skin. 648.*

(C) Action against a Common Carrier.

(C. 1.) When it lies.

SO an action upon the case lies against a common carrier, who carries goods for hire, if the goods mis-carry. *1 Rol. 2. l. 10. 2 Vent. 75. Bro. R. 11.*

*By the general custom of the realm, a common carrier insures the goods at all events; but he may make a special contract, in extraordinary cases, on extraordinary terms. *4 Bur. 2302. 1 Term Rep. 33**

So, against a common hoy-man. *1 Rol. 2. l. 15. 1 Sid. 36. R. Hob. 18.*

So,

ACTION upon the Case for Negligence.

So, against a master of a ship for goods, which he carries; for he has hire, tho' he be paid by the owner, and the owner is paid by the merchant. *R. 1 Vent. 190, 238. Ray. 220. 2 Lev. 69.*

So, against a stage-coachman for goods, which he carries for hire. *1 Sal. 282.*

So, against the part owners of a ship, as well as against the master. *R. 3 Lev. 259. Sho. 29, 101. Carth. 62.*

But all the part-owners ought to be joined. *R. 3 Lev. 259. Sho. 29, 101. 3 Mod. 321. 2 Sal. 440. Carth. 62. Skin. 279.*

Tho' the plaintiff did not know, that there were more owners than the defendants; for if he takes notice of any, he ought to take notice of all. *R. 3 Lev. 259. Sho. 29.*

* *Qu.* Whether, if the defendants who are sued, do not plead in abatement, that there are other persons who ought to be joined, and who are not named, but plead *non assumpsit*, the plaintiff will not be entitled to recover. *Vide 4 Burr. 2613. et seq.**

*By the common law the owners of a ship are liable to the full amount of every loss by robbery. *1 Term Rep. 18.* But to relieve them from hardship and to protect them against all treachery in the mariners and master, and that they may be rendered answerable for their acts no farther than they have trusted them, It is enacted by *st. 7 G. 2. c. 15.* That no owner of any ship or vessel, shall be liable to make good any loss or damage, by reason of any *embezzlement, secreting, or making away with*, by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which after the 24th *June, 1734*, shall be shipped on board any ship or vessel, or for any act, matter or thing, damage or forfeiture done, occasioned, or incurred from and after the day aforesaid, by the said master or mariners, or any of them, without the privity or knowledge of such owner, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due or to grow due for and during the voyage.*

*The owners are protected, by this clause, in the case of a robbery in which one of the mariners is concerned by giving intelligence, and afterwards sharing the spoil. *1 Term Rep. 18.**

So, it lies against the executor, or administrator of a carrier; for it is founded upon the contract. *5 Mod. 92.*

And it lies, tho' there was no agreement for a price certain; for a common carrier may have a *quantum meruit*. *R. 1 Sid. 36.*

Tho' the carrier, hoy-man, master, &c. has the usual number of servants to take care of the goods. *R. 2 Lev. 69.*

Tho' the owner be present with the goods: as, if the owner goes in a stage coach; if the coachman has a distinct price for his goods. *Per Holt at Guildb. 1 Sal. 282.*

Tho' the owner after the delivery of the goods to the hoy-man goes in the same boat, and there asks another to hold them in the boat; if the hoyman be not discharged. *R. 1 Rol. 2. l. 20.*

Other-

Otherwise, if the owner goes in the coach, &c. tho' the goods were delivered to the servant and he gave him a gratuity. 1 Sal. 282.

[If a man sends his servant with his goods, who locks them up in the lighter, the lighterman is not liable, for the goods were not in his possession. *E. J. Co. v. Pullen*. H. 12 G. Str. 690.]

Tho' the carrier be robbed. *R. Mo.* 462. 1 *Rol.* 2. l. 25. 1 *Vent.* 239. *R. 2 Mod.* 270. *Co. Lit.* 89. a. *R.* because he has hire. 1 *Sal.* 143.

And had a sufficient number of servants to conduct the waggon or ship, but they are vanquished by force. 1 *Vent.* 239. *Moll. de jur.* M. 209.

So, tho' a ferry-man, not knowing the value of the goods, in a tempest throws them into the sea, *R. al.* 93. *cont. R.* 2 *Bul.* 280. 1 *Rol.* 79. (a)

Yet the master of a ship shall not be charged, if he be robbed upon the high sea. *Per Holt.* *This must be under the common exception of perils of the sea.*

Or, throws out goods in a tempest for the safeguard of the ship, and their lives. *R. 2 Bul.* 280.

[The master of a hoy shall not be chargeable for goods lost or damaged by tempest. *Semb. Amies v. Stevens*, M. 5 G. Str. 118.]

[But a ship-master who undertakes to carry goods, safe, must deliver them so, unless damaged by act of God, or king's enemies; plaintiff need only prove their good order when delivered on board, and their being damaged when delivered out. Evidence shall not be allowed to shew defendant was careful. Thus, if a puncheon of rum is staved in letting down, or there is a leak, whereby goods are damaged. *Goff v. Clinkard*, H. 23 G. 2. *Dale v. Hall*, M. 24 G. 2. 1 *Wilf.* 281.]

* So a carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even tho' the jury expressly find that the goods were destroyed, *without any actual negligence in the carrier.* *Forward v. Pittard*. 1 *Term Rep.* 27.*

* He is liable for any inevitable accident, happening through the intervention of any human means, as by fire which began at another booth in a fair than that wherein the goods were placed, and afterwards spread thither, with inextinguishable fury. *Id.* *Id.* *

So it lies, tho' the carrier did not know, what the goods were. *R. Al.* 93.

And if the carrier demands what the goods are, and is answered, *silks, or such like goods*, when it was money. *R. Vent.* 238. * *Contra 4 Burr.* 2301, 2302. for the carrier ought to be apprised of what he undertakes; and he ought not to be answerable where he is deceived, the true principle being that

The contrary resolution is certainly law, and it depends on the same principles as the case next but one *infra*.

the

the carrier is liable only for what he is fairly told of. *Sir Joseph Tyly et al v. Morrice, Carth. 485.**

Otherwise, if the carrier declares, that he will not answer, if they are other goods than such. *1 Vent. 238. Semb. al. 93.*

[A carrier is answerable for money in a box, though not delivered to him as such; unless he asks and the other denies, or unless he accepts conditionally, if there be no money. *Titchburne v. White, H. 5 G. Str. 145.*]

[His warranty is in respect of his reward, which ought to be in proportion to his risk; therefore if money, &c. is concealed, and he would not be paid according to the usual rate of such things, he is not liable. *Gibbon v. Paynton. P. 9 G. 3. 4 B. M. 2298. The Cases supra al. 93. 1 Vent. 238. 1 Str. 145.* were not allowed to be law.]

And if the carrier be mis-informed of the value or quality of the goods, this may be in mitigation of damages. *Per Rol. al. 93. * Vide supra.**

If a person delivers goods to be carried to the servant of a stage-coach, above the usual weight in such stage, without an agreement to pay for them, the master shall not be charged, if they are lost. *Per Holt, Skin. 625.*

So if money is delivered in a bag to a carrier for 200*l.* and carriage is paid only for so much, the carrier being robbed shall not answer for more. *R. Carth. 486.*

[Box directed to *A.* in *B. street, London*, the direction is obliterated; *A.*'s name and abode are in the printed directory* and his name only in the way bill;* defendants (masters of stage-coach who take higher prices than other carriers) kept a constant porter to carry out goods, they make no enquiry of plaintiff, nor of *A.* nor send the box, which remains in their warehouse till the goods are damaged; defendants are liable. *Golden v. Manning, T. 13 G. 3. 3 Wils. 429.*]

*The action lies by the consignor, in his own name, who agreed with the carrier and was to pay him: and the carrier has nothing to do with the vesting of the property, or between the consignor and consignee. *5 Burr. 2680.**

*So where the plaintiff consignor averred that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee is no variance; the consignor being by law liable. *1 Term Rep. 659.**

When an action lies against him, who undertakes to carry *Vide Action upon the Case for Misfeasance, (A. 3.)*

(C.2.) Declaration.

The declaration must be upon the custom of the realm *1 Sid. 245.*

And must express the goods with the same certainty as *trover. Semb. 2 Vent. 78.*

(C.3.)

(C. 3.) Plea.

To this action the defendant may plead, not guilty. 2 Vent.

77. 5 Mod. 92.

But anciently, the defendant answered to the neglect particularly. 5 Mod. 92.

So, if he plead *non assumpsit*, it is bad. Dub. after verdict.
2 Mod. Ca. 178.

ACTION upon the Case for a Nuisance.

(A) When it lies.

SO an action upon the case lies for a nuisance to the habitation, or estate of another: as, if a man build an house hanging over the house of another, whereby the rain falls upon it. 5 Co. 101. 2 Rol. 140. l. 50. 1 Rol. 107. l. 47. 2 Leo. 93.

[If a man fixes a spout to his own house, from whence the rain falls into the yard of another and hurts the foundation of his buildings. *Reynolds v. Clark*, T. 10 G. Fort. 212.]

If a man dig a pit in his land, so near that my land falls into the pit. 2 Rol. 565. l. 10.

So, if he stop the antient lights of another house. R. 9 Co. 58. a. 2 Rol. 140. l. 45. R. 1. Leo. 168. 1 Sid. 167. 1 Lev. 122. 1 Rol. 107. l. 45. Jon. 326.

So, if a man build a new house, and afterwards grant the adjacent soil, and the grantee by an edifice upon it stop the lights of the other house; tho' it was not an antient house. R. 1 Vent. 237, 239. 1 Sid. 167. Ray. 87. 1 Lev. 122. R. Mod. Ca. 116.

And if by throwing logs, &c. he stop the lights of the other house. 1 Sid. 167. 1 Lev. 122.

So, a custom, that one may build upon a new foundation to the obstruction of antient lights, is void. R. 1 Rol. 558. l. 46. 566. l. 5. Yel. 216. Vide London, (N. 5.)

So, if a man erect any thing offensive so near the house of another, that it becomes useless thereby: as, a swine-sty. R. 9 Co. 59. a. 2 Rol. 141. l. 13.

Or, a lime-kiln. 9 Co. 59. a. 2 Rol. 141. l. 5.

Or, a dye-house. Hutt. 136.

Or, a tallow-furnace. Cro. Car 510. 1 Rol. 88. l. 41.

But if he be a chandler, *quare*. 1 Rol. 88. l. 48. 2 Rol. 139. l. 2.

Or, a privy, or brew-house. Hutt. 136. R. Pal. 539.

Or, a tan-fatt. Hutt. 136.

Or, a smelting house. 1 Rol. 89. l. 15.

Or, a smith's forge. Lut. 70.

So,

So, if a man erect a wash-house, stable, &c. and put filth in it, to the annoyance of a garden. *Lut.* 92.

So, if a parson permit the tithes to continue upon the soil; whereby the grass there is corrupted.

Or, a vendee of hay after the time agreed for carrying it away.

R. 2 Leo. 93.

So, if a lessee over-charge his room with weight, whereby it falls upon the cellar beneath; an action upon the case lies against him. *R. 2 Leo.* 95. *Poph.* 46.

So an action upon the case lies, if a man erect a mill so near to my antient mill, that the water to my mill is obstructed, or diverted. *2 Rol.* 140. *l.* 35. *1 Rol.* 107. *l.* 35. *R. 1 Leo.* 273.

So, if there be a new mill upon a stream, that did not use to be diverted. *Per Hale, 1 Vent.* 237.

So, if part only of the stream is diverted. *Dy.* 248. *b.*

So, if he stop a water-course, whereby land is overflowed: *2 Rol.* 140. *l.* 30.

So, if one erect a ferry so near to my antient ferry. *2 Rol.* 140. *l.* 20. *Hard.* 162.

So, if without warrant he erect a market, to the prejudice of another market. *2 Sand.* 172. *1 Lev.* 296.

So, if he has a patent for a fair or market in the next town to my fair or market, and upon the same day. *2 Rol.* 140. *l.* 10.

So, if it be upon another day, and at seven miles distance, being without warrant, and found to my prejudice; tho' no prejudice appears. *R.* after verdict, *2 Sand.* 172. *1 Lev.* 296. *Ray.* 195.

So, if water *currere consuevit* to a well, *et abinde* to his house for his use, and one diverts the stream from coming to the well. *R. Skin.* 389.

If the soil, over which another has a way, be ploughed by the tenant of the land, it is a nuisance. *2 Rol.* 140. *l.* 7.

(B) By Whom, or against Whom it lies.

IF the nuisance is to the damage of the inheritance, he in reversion shall have an action for it. *R. 3 Lev.* 209. *Jeffers v. Gifford, M.* 7 *G.* 3. *4. B. M.* 2141.

And likewise the tenant in possession, for the damage to his possession. *R. 3 Lev.* 209. *Adm. Jon.* 326.

So, for a nuisance in the life of the testator continued afterwards, the devisee shall have an action. *2 Cro.* 231.

An action upon the case lies for a nuisance to the freehold, tho' the plaintiff might have an assise, or *quod permittat*. *R. com. Cro. El.* 520. *R. acc. 1 Rol.* 104. *l.* 37. 47. *Semb. acc. Cro. El.* 199. *R. acc. Cro. El.* (466.) *R. acc. Cro. El.* 845. *Acc. 21 H.* 7. 30. *a. R. 1 Leo.* 247. *R. 2 Leo.* 184. *Vide post. (D. 1.)*

An action upon the case lies against him, who erects the nuisance.

So,

So, against him, who continues a nuisance erected by another; as if *A.* divert water by a pipe and cock to his house; an action lies against his wife after his death, if she lives in the house, and uses the water; for every turning of the cock is a new nuisance. *R. Dy. 320. a.*

So, if a man erect a house, or mill, to the nuisance of another; every occupier afterwards is subject to an action for the nuisance. *Dub. 2 Cro. 373. R. 2 Cro. 555.*

So, if a man recover against *A.* for the erection of a nuisance, he may afterwards maintain an action against him for the continuance, though he has made a lease of it to another. *R. Sal. 460.*

Or, may have it against the lessee of *A.* for the continuance, at his election. *Sal. 460.*

(C) When it does not lie.

BUT an action upon the case does not lie upon a thing done to the inconvenience of another: as, if a man erect a mill near to the mill of another; whereby the other loses part of his profit. *1 Rol. 107. l. 20. 11 H. 4. 47. b.* where the former mill is not *a tempore cujus contrar.* *Sc. 1 Leo. 273.*

If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies.

If a school-master set up a school near to the school of another. *1 Rol. 107. l. 15. R. upon demurrer. 11 H. 4. 47. a.*

If a man build an house; whereby my prospect is interrupted. *Per Wray, 9 Co. 58. b.*

If a man convert land to pasture, where none but *A.* had pasture before, whereby *A.* is prejudiced. *1 Rol. 107. l. 30.*

If a foreigner use a trade within a borough to the prejudice of a freeman, unless he be restrained by a custom or by-law. *R. 1 Lev. 262.*

So it does not lie for a reasonable use of my right, tho' it be to the annoyance of another: as, if a butcher, brewer, &c. use his trade in a convenient place, though it be to the annoyance of his neighbour.

If a man build an house, and make cellars upon his soil, whereby an house newly built in an adjoining soil falls down. *R. 1 Sid. 167. R. 2 Rol. 565. l. 5.*

So, if by such building he stop lights newly made in the house of another. *1 Sid. 167. 1 Lev. 122. 1 Vent. 237, 239.*

Tho' the lights have continued for 30 or 40 years. *R. Cro. El. 118.*

If a man make a ditch in his waste, which lies near the highway, within 36 feet of the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault, that his horse escaped into the waste. *R. 1 Rol. 88. l. 30. 2 Cro. 159.*

So, if a man in *London* erect upon an ancient foundation an edifice, which obstructs the ancient lights of an adjoining house. *1 Rol. 558. l. 46.*

So, if a man use water in his own land out of a water-course running through his land to the pond of *B.* whereby *B.*'s pond is not so full; if he does not divert the water-course. *Per St. John at Suffolk ass. 1657. between Smart and Stisted.*

So an action upon the case does not lie, if the defendant prevents an excess in the plaintiff in using his right; as, if *A.* had lights in an ancient house, and he re-builds his house, and makes lights in other places, and larger, to the inconvenience of the plaintiff. *2 Ver. 646.*

So an action upon the case does not lie for a common nuisance, without a special damage. *Co. Lit. 56. a. Vide action upon the case, (B. 1, 2.)*

As, if a man make a ditch in a highway, whereby *A.* cannot use it. *1 Rol. 88. l. 9. Dan. 172. R. Mo. 180.*

If a man stop a common ferry. *R. Carth. 193. Vide action upon the case for negligence, (A. 3.)*

Otherwise, if there be a special damage; as, if a man make a ditch in the highway, and my horse falls into it. *Co. Lit. 56. a. Dan. 173.*

Or, if my servant falls in, and maims himself, whereby I lose his service. *1 Rol. 88. l. 36. Dan. 173.*

So, if by logs in the highway, my horse falls with me. *1 Rol. 88. l. 16. R. 2 Cro. 446.*

If by stopping the highway, a man is constrained to use a longer and more difficult way. *Dan. 173. R. in C. B. Tr. 11 G. 2. between Sir John Chichester and —*

Or, if by stopping the way, the sale of his coals is hindered in an adjacent colliery. *Dub. Carth. 451.*

A fortiori, if by the obstruction of the sale, his coals are damaged. *Carth. 451.*

Yet the special damage must be direct, not consequential. *Carth. 194.*

And therefore it is not sufficient to say, That he was stayed for a little time, whereby his affairs were neglected. *Ibid.*

(D. 1.) What Remedy for a Nuisance.

(D. 1.) Affise, or Action upon the Case.

FOR a nuisance to a freehold the plaintiff shall have an affise, or an action upon the case, at his election. *F. N. B. 183. l. 1 Rol. 104. l. 30, &c. Vide ante, (B.)*

But if the nuisance consists in nonfeasance, he shall not have an affise. *2 Rol. 141. l. 45. 11 H. 4. 83. a.*

Or, if it be done to a lessee for years. *F. N. B. 184. G.*

And, if the nuisance be continued, an action lies against the heir, or alienee of him, who erected it; for the continuance is a new nuisance. *Vide ante, (B.)*

(D. 2.)

(D. 2.) *Quod permittat.*

So a man may have a *quod permittat* against him who erects the nuisance, to remove it. *Vide Quod permittat.*

Or against his heir, or alienee. *F. N. B.* 184. *C.*

Whether the erection be by the tenant himself, or a stranger. *R. Sal.* 458.

And a *quod permittat* lies *de edificio.* *R. Sal.* 458.

(D. 3.) Indictment.

So an indictment lies for a nuisance. *Vide Indictment, (D.)*

After a conviction, if the defendant will not remove it at his charge, a writ goes to the sheriff to remove it. *Comb.* 10.

(D. 4.) Prohibition for Removal.

So a writ issues to remove a nuisance *in vicis, et venellis ville.* *F. N. B.* 185. *D. Vide Prerogative, (D. 36.)—Prohibition, (A. 3.)*

So an inhibition may be granted to remove a stage for ropedancing, a bowling-alley, &c. where it becomes a nuisance. *1 Mod.* 76.

So, for erecting a play-house, where it will be a nuisance. *Semb. Skin.* 627.

So, a man may enter to abate a private nuisance. *F. N. B.* 184. *G.* 185. *A.*

As, if a house hangs over, he may enter, and throw down the part hanging over. *2 Rol.* 144. *l.* 39. * But no more, for he can abate only that part which constitutes the nuisance. *Str.* 688. *1 Burr.* 267. *

If a nuisance be done to my mill, land, &c. I may remove it. *2 Rol.* 144. *l.* 36, 39.

So, if it be a common nuisance: as, a gate erected across an highway, every one may throw it down. *Per three J. Cro. Car.* 285. *Jon.* 221.

* If the lord erect a hedge, a gate or a wall, to keep the commoner's cattle out, the commoner may abate the hedge, &c. *1 Burr.* 265. *

* But he cannot meddle with the soil; as if the lord put rabbits in the common, the commoner cannot destroy the burrows; he must have recourse to his legal remedy for a surcharge of common, if sufficient common be not left. *1 Burr.* 259. *Vide S. C.* 2 *Wils.* 51. *

And a man may enter into the soil of another, when it is necessary, to remove a nuisance. *2 Rol.* 144. *l.* 42. 145. *l.* 25. *R. Sal.* 459.

And may justify the cutting down of a gate, &c. which is a nuisance. *Per three J. Cro. Car.* 185. *Jon.* 122.

Or, pull down a house with violence, whereby the materials are lost. *R. Sal.* 458.

So he may remove it, without a request. 5 Co. 101. a.

So he may remove it, before the damage happens. 2 Rol. 145. l. 20. 5 Co. 101. b.

But he cannot remove it, before the nuisance is erected; as, he cannot remove scaffolds, &c. for making a building, which will be a nuisance, when finished. 2 Rol. 145. l. 10.

Nor, the foundation of a building, which will stop his lights, when erected. R. 3 Bull. 196.

* But in this case, it would be adviseable to give notice in writing, to the person building, not to proceed, and that if he do, and the lights be obstructed, the building will be pulled down; otherwise if the building be suffered to proceed, till completed, without objection, it is questionable whether the party can justify the pulling of it down. So if a man erect part of his building on my land, I knowing of it and not objecting, the law will not permit me afterwards to pull it down, I having tacitly consented. *Per Ld. Mansfield at nisi prius, and the determination passed without objection.* 1 Morg. Vaid. Mec. 297. *

So, after the removal, he cannot destroy the materials. R. Jon. 222.

Nor, cut down, or do any damage, after the nuisance is abated, or in the abatement, unless necessary. *ibid.*

(E) The Proceedings in an Action upon the Case for a Nuisance.

(E. 1.) The Declaration.

IN an action upon the case for a nuisance, the plaintiff must shew himself intitled to the thing, to which the nuisance was done, at the time of the nuisance; as, in an action upon the case for diverting his water-course to his mill, he must shew, that he was seised of the mill at the time, R. Cro. El. 751.

So he ought to shew, that the diversion was a prejudice to his mill. *Semb. Skin. 65, 175.*

So he ought to alledge a continuance of the nuisance to the time of the action only; for *ad hoc continuatim existit*, is ill; for that goes to the time of the declaration. R. 1 Sho. 366.

But if the declaration shews a continuing nuisance, it is not material, though the first nuisance was before the plaintiff was intitled. R. Cro. El. 191.

So, if the plaintiff alledge, that his father was seised and died, and a descent to himself, *virtute cuius* he was seised, without saying, that he entered; for a seisin in law is sufficient for this action. R. 1 Leo. 273.

So, if the plaintiff alledge, that his house, mill, &c. was *antiqua domus*, &c. without prescribing for it. *Vide Prescription.*

Or, that it was *ab antiquo erectum*; for that is tantamount. R. 1 Leo. 273.

So, in an action for a nuisance, if the plaintiff alledge, *quod possessionatus fuit* of such a house, &c. in which *habere debet* so many

many lights, &c. without more, it is sufficient. *R. Sho. 7. Vide in Pleader, (C. 39.)*

So a declaration for stopping of lights is sufficient, tho' it do not say, *antiquum messuagium*. *R. 1 Vent. 237, 239.*

So a declaration for diverting a water-course, which *currere consuevit* to a well, *et abinde* to his house, is sufficient; tho' it do not say, from what place it runs to the well. *R. after verdict; for it ought to be proved. R. Skin. 389.*

[So if the declaration says, that defendant maliciously continued and caused to run, a water-course near plaintiff's foundation, and did not repair the pipes, whereby he was damaged, it is well; tho' it does not say that the pipes were his, or that he laid them there, or was obliged to repair; and tho' plaintiff does not set out a title, but only says, he was lawfully possessed. *Heare v. Dickinson, P. 3 G. 2. Ld. Raym. 1568.*]

(E. 2.) The Plea, &c.

[Plea that defendant did remove the nufance is ill. *Westen v. Eales, M. 9 G. Fort. 333.*]

To an action upon the case for a nufance in over-hanging his house, &c. the defendant generally shall plead, Not guilty.

To a nufance in stopping his lights, he may say, Not guilty.

Or, that by the custom of *London*, a man may build upon an antient foundation against the lights of another. *Vide Ent. 29.—Vide Tel. 215, 216.*

To which, the plaintiff by replication may deny the custom, which shall be tried by the mouth of the recorder.

But to an action upon the case for a nufance the defendant cannot plead, that being a blacksmith he came to the house wherein he dwells, by the advice of the plaintiff himself, and there erected a forge for his trade. *R. Lut. 70, 71.*

If the verdict find generally, that the house is not erected upon the antient foundation, the whole shall be abated, tho' it exceeds only a foot. *R. Mo. 866.*

For more concerning nufance, *Vide Chase, (K.)—Justices of Peace, (B. 24. &c.)—Leet, (L. 12, 13.)*

ACTION upon the Case upon Trover.

(A) When it lies.

TROVER lies by him, who has a property in goods and chattels, which come to the possession of another, and are by him converted to his own use.

* And it is not material whether the possession of the defendant was obtained lawfully or unlawfully: the conversion is the wrong

on which the action is founded. In form, the action is a fiction as to the finding; in substance, it is a remedy for the wrongful conversion. 1 *Burr.* 31. *

If *A.* puts his goods in *B.*'s barn by his consent, and has the key in his custody, *A.* may have *trover*, if any one converts them; for the possession and property are in him. *Per Periam, Sav.* 134.

* So if *B.* had kept the key, for property is sufficient to maintain the action. *vid. infra.* *

(B) By whom.

AND every one, who has a property in the goods converted, may have *trover* for them.

* But no one who has not a property can maintain *trover*, as tenant in tail expectant on the determination of an estate for life, without impeachment of waste for trees which grew, and were severed from the estate; for the property is in the tenant for life, the moment the trees are cut down. 1 *Term Rep.* 55. *Vid. Market.* (E). *

If a servant purchase goods for his master, which are afterwards converted by another, *trover* lies by the master; for by the possession of the servant the property is vested in the master. *R.* but judgment was afterwards reversed; because it was money, which cannot be known, and the property follows the possession. *Cro. El.* 638, 661, 746.

If an apprentice earn any thing, as tickets for sea-wages, *trover* lies by the master. *R.* 1 *Sal.* 68. *Mod. Ca.* 69.

And if he be an apprentice in fact it is sufficient; for, *how apprentice* is not material. 1 *Sal.* 68.

Tho' a man has only a special property; as, a common carrier, who loses goods delivered to him to be carried. *R.* 1 *Rel.* 4. l. 52.

A sheriff, for goods levied upon a *fieri facias*, which are taken out of his possession before sale. *R.* 2 *Sand.* 47. 1 *Sid.* 438. 1 *Mod.* 30. 1 *Lev.* 282.

Commissioners of bankrupts, for goods of the bankrupt taken out of their possession. *Per Tawisd.* 1 *Mod.* 31. *Dan.* 20.

* If a man in contemplation of bankruptcy buys goods, and, in order to give a preference to one creditor, makes a fraudulent and pretended sale of such goods, *trover* lies by the assignees of the bankrupt against the creditor who received the value under such pretended sale; for the sale is void, the goods were the property of the bankrupt *before* the sale, and did not *vest* in the pretended purchasers, but became that of the assignees by relation. 4 *Burr.* 2477. *

So, if a bill of exchange payable to *A.* or order, be indorsed with the name of *A.* but no assignment written, and afterwards found by *B.* *trover* lies against him by *A.* for by the writing of his name the property of the bill was not transferred. *R.* 1 *Sal.* 130.

And

And it is not necessary, that the plaintiff ever had the possession; for *trover* lies by an executor for the goods of the testator, tho' they never were in his actual possession. *D. 2 Mod. 168. R. Cro. El. 377. R. Lat. 214. Sav. 133.*

So, if by agreement goods bailed to *A.* by *B.* ought to be bailed over to *C.* in satisfaction of a debt due from *B.* to *C.* which *A.* afterwards converts to his own use, *C.* may have *trover* against him, tho' he never had the possession. *R. 1 Bul. 68.*

So *trover* lies against the bailee of the goods, by him to whose use the bailment was. *R. 1 Bul. 68.*

[If a man obtains a bank-note (of which another was robbed) for a fair consideration, * and without notice of its being stolen, * and a clerk of the bank detains it, he may bring *trover*. *Miller v. Race, H. 31 G. 2. 1 B. M. 452.*]

* So, it lies for wreck by the lord of the manor entitled by prescription. *2 Wilf. 23. **

So it lies for an estray, before an actual seizure. *Per Ch. J. 2 Keb. 589.*

[So by the finder of a jewel. *Armory v. Delamirie. H. 8 G. Str. 505.*]

And for a wager, against him who held the stakes. *Cro. El. 870.*

* *Qu.* of this, for in order to maintain *trover*, the money ought to be in a chest or bag, &c. *

So it lies by a lessor for timber cut down by the lessee, tho' it was carried away before seizure. *R. 2 Rol. 119. l. 30. Cro. Car. 242.*

* So, where one claiming a right to cut down wood, cuts it down, though he has no legal right to the wood, yet by cutting thereof he gains such a property therein that *trover* lies against a stranger for taking it away. *Crok. Eliz. 819. cited 3 Wilf. 336. **

* So, where the plaintiff claimed a right to cut rushes on a common and cut down 5 or 6 loads, *trover* lies for the plaintiff against a stranger who takes it away. *3 Wilf. 332. **

(C) For what Goods.

TROVER lies *pro pecuniis numeratis* in a chest, tho' not locked, or sealed. *R. 1 Rol. 5. l. 15.*

So, *pro pecuniis numeratis* out of a bag; for the thing itself is not recovered, but damages for it. *R. 1 Rol. 5. l. 10. Per two J. Cro. El. 819. R. Cro. Car. 89. R. Al. 91. Dan. 20. Semb. Sav. 20.*

So it lies for a bond; and it is not necessary to shew the date; for it is lost. *Cont. per 3 J. Cro. El. 723. R. acc. 2 Cro. 638. R. Cro. Car. 262. 1 Rol. 5. l. 20.*

So, for letters patent. *R. Hard. 111.*

So, *pro bonis et catallis sequent. viz. uno scripto obligatorio, una warrantia, &c.* *Semb. 4 Mod. 156.*

For bank bills, exchequer bills, tickets, &c. *1 Sal. 283. 4.*

So it lies for a ship with her tackle. *D. Mar. pl. 188.*

* So, for a whale by the master of one ship against another who, contrary to the practice of the fishery, obtained the whale under pretence that his harpooner had struck first.*

For trees planted in boxes in a garden. *Mod. Ca.* 170.

So it lies for so many *pecuniis argenti*. *R.* 1 *Sal.* 219.

So it lies for musk-cats, monkeys, parrots, &c. without saying, that they are reclaimed; for they are merchandize, and valuable. *R.* 2 *Cro.* 262. 1 *Bul.* 95.

So, for a negro man; for it is merchandize. *Dist.* 3 *Lev.* 336. *Semb.* 2 *Lev.* 201. *Semb. cont. Sal.* 667.

So it lies for a hawk, if it be alledged to be reclaimed; otherwise, not. *R.* *Dy.* 306. *b.* *Cro. Car.* 544. 1 *Roll.* 5. l. 25. *Dan.* 21.

But if the declaration say, *de bonis propriis*, after verdict it shall be intended to be reclaimed. *Per Cro. Car.* 544. 1 *Roll.* 5. l. 25.

So it lies for a spaniel; for he is reclaimed. 1 *Roll.* 5. l. 30. *Acc.* 3 *Lev.* 336, 7.

So, for a greyhound; and it need not be averred to be reclaimed; for it shall be intended. *R.* *Cro. El.* 125. *Ow.* 93.

(D) Against whom,

T*ROVER* lies against every one, who has the possession of goods, and converts them; if he has them by *trover*.

As, if a bailiff of a manor seize goods left in the manor by a felon, (but not waived,) and refuse to re-deliver them.

If a man ride a horse to an inn, and the inn-keeper detains him there without cause.

* So, if plaintiff in an action sue out execution against the goods of a bankrupt after an act of bankruptcy committed, *trover* lies by the assignees of bankrupt against the plaintiff in the action without joining the officer. *Str.* 996.*

* So, in the like case it lies against the sheriff for selling the goods after notice of the act of bankruptcy committed. 1 *Burr.* 20. 1 *Term Rep.* 475.*

* So, against the vendee. *Id.* 34.*

* Or against all three together. *Bloxholm v. Oldham et al'*, at sittings after Tr. 1750, at Guildhall, before Lee, C. J. cited and approved. 1 *Burr.* 22.*

So, if he have the goods by bailment; as, if a man bail goods in pledge, which are detained after the money is paid. *R.* 1 *Roll.* 60. *Mo.* 841.

Or, if bailed to keep, and they are detained, after demand. 1 *Brownl.* 12. *Dub.* 1 *Roll.* 128. *R.* *Cro. El.* 781

If a man deliver writings to an attorney to make an assignment, &c. and he detains them till he is paid for the assignment; for he has a remedy for his labour, and cannot detain the writings. *Per Holt, P.* 6 *W. & M.* §

§ *Note.* This seems not to be law: it is well known that an attorney is not compellable to give up papers in a cause, tho' pending a suit, until his bill be paid, and there seems no reason, why in the case in question, he should not equally have a lien on the writings, he has a remedy in the one case as well as in the other.

If a man present jewels, &c. to a woman, whom he intends to marry; and the marriage being interrupted, she refuses to redeliver them.* This must be intended where the interruption is on the part of the woman.*

So *trover* lies against him, who had the possession, tho' the plaintiff has the goods before the action commenced; for he shall recover damages for the conversion. *Per W. Wyndham, at Norfolk ass. 1660. Tindal and Jolliffe.*

* But *trover* does not lie against an executor for a conversion by the testator in his life-time; nor against an administrator for a conversion by his intestate; for the action is in form of a tort, and comes under the rule, "*actio personalis moritur cum persona.*" But the estate is liable, and another form of action may be maintained. *Cowp. 371.**

So it lies against him, to whom the servant or agent of the plaintiff delivers goods, with intent to imbezzil them. *R. 1 Sal. 289.*

So *trover* lies against the master, if his servant take goods for him in pledge, lend the money, and afterwards sell the goods; for he acts in the whole as his servant. *Per Holt. at Guildb. M. 10 W. 3. Sal. 441.*

* This case seems doubtful, if there was only proof of demand and refusal, which are only evidence of a conversion; and proof of the plaintiff's having the goods again, being given, it evidently shews, defendant did not convert the goods to his own use. Where the owner suffers a serious injury by the detention of his goods, there seems no reason why a special action on the case should not lie for that detention. *1 Morg. Vad. Mec. 305.**

[It lies against the master for goods delivered to the servant to be assayed. *Mead v. Hamond, H. 8 G. Str. 505.*]

[For jewels taken out of the socket by the servant. *Armory v. Delamirie, H. 8 G. Str. 505.*]

[Against a servant who disposes of goods the property of another, to his master's use, whether he has authority from his master or not. *T. 25 & 26 G. 2. 1. Wilf. 328.*]

So, if *A.* deliver lottery tickets to a goldsmith to receive the money due upon them, and he being bound by a note to *B.* to deliver so many tickets to him, delivers him these tickets; against *B.* the property is not thereby changed, and thereby *trover* lies against *B.* *R. 1 Sal. 283.*

[If a man deliver jewels sealed up to a goldsmith for safe custody, who takes them out and carries them as his own to *A.* who keeps a shop in London where they deal in jewels, and pawns them; *trover* lies against *A.* *Hartop v. Hoare. P. 16 G. 2. Str. 1187. 1 Wilf. 8. 3 Atkyns 44.*

Trover lies against husband and wife, supposing the conversion by both; for it is a tort. *R. 1 Rol. 6. l. 15. R. Tel. 165. Vide cont. 1 Brownl. 3.*

But if the conversion be alledged *ad usum ipsorum*, it is bad. *R. 2 Cro. 661. Jon. 16, 264, 443. R. 1 Rol. 6. l. 15, 27, 30. R. Cro. Car. 254, 494. Semb. Mar. pl. 94. Vide Baron and Feme, (Y.)*

Yet,

Yet, if the jury find the wife not guilty, a declaration, which alleges a conversion *ad usum ipsorum*, will be aided. *R. Mar. pl. 134. Vide Action, (G.)*

If goods come to several successively, *trover* lies against any of them, who convert them.

If bank bills, tickets, &c. stolen or lost, are paid or delivered to another without consideration, *trover* lies against any one, in whose hands they are found. *Semb. 1 Sal. 284.*

* So, tho' he gave consideration for them, if he had previous notice of their being lost or stolen. *Determined by Ld. Mansfield at Nisi Prius. 1 Morg. Vad. Mec.**

If a bill payable to *A. or bearer* be found by *B.* who for a valuable consideration gives it to another, *trover* lies for it against *B.* *1 Sal. 126.*

(E) Conversion, what.

IF goods are bailed, and not delivered upon demand, this is evidence of a conversion. *R. 1 Rol. 5. l. 50. 10 Co. 56. b.*

But if it be found by special verdict, it shall not be adjudged a conversion. *Cont. per three J. Mo. 460. Cro. El. 495. but Popb. acc.* and it was adjourned for a little time, and afterwards adjourned. *Dub. 2 Bul. 308. 1 Rol. 5. l. 50. R. acc. 10. Co. 57. Hob. 187. R. 2 Mod. 245. Acc. if they are goods that may be known. 1 Rol. 131.*

If goods are found, and not delivered upon demand, this is a conversion. *R. 1 Rol. 5. l. 45. R. Cro. Car. 262.*

So, if a thing cannot be known, a denial shall be adjudged a conversion, tho' it be upon a special verdict: as in *trover* for money out of a bag; for there can be no other conversion of it proved, but the refusal to deliver it. *Per three J. 1 Rol. 131, 2.*

If a man make use of the thing found, it will be a conversion. *Cro. El. 219.*

If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion. *Mod. Ca. 170.*

If a man deliver the oats of another to *B.* to be made oat-meal, and the owner afterwards prohibits him, but yet *B.* makes the oat-meal, this is a conversion. *Per Berkley, 1638.*

If a man misuse a thing found, that will be a conversion; as, if he throw paper into the water. *Cro. El. 219.*

[If part of the liquor is drawn out of a vessel, and it is filled up with water, it is a conversion of all the liquor. *Richardson v. Atkinson, M. 10 G. Str. 576.*]

So, if he misuse a thing entrusted to his care; as, if a carrier sell goods delivered to him for carriage. *2 Sal. 655.*

Or, break open a box and take the goods to himself. *Ibid.*

If *A.* not being executor or administrator, request *B.* to provide for the funeral of a deceased, and afterwards deliver goods of the deceased in satisfaction, *trover* lies by the executor or administrator against *B.* for these goods. *Per Holt, Carth. 104. Skin. 274.*

[Goods

[Goods taken in intestate's life, and kept till his death, but not used till after it, is *trover* and conversion in intestate's life. *Cressier v. Ogilby*, T. 3 G. Str. 60.]

If a man ride the horse of another, and afterwards re-deliver him to the owner; this does not purge the conversion, but goes in mitigation of damages. R. 1 Rol. 5. l. 40.

But the negligent custody of a thing is not a conversion; as, if a barrel of butter be bailed to another, *qui negligenter custodivit, ita quod* it was spoiled. R. Cro. El. 219. Ow. 141.

So, if a carrier neglect goods delivered for carriage, whereby they are spoiled. R. 2 Sal. 655.

So, if goods are stolen out of the custody of a common carrier, that is not a conversion. 1 Rol. 6. l. 5.

If a man removes goods which he has a right to remove, and does not replace them, and they are lost; it is no conversion. *Euskel v. Miller*, M. 5 G. Str. 128.]

Or, taken by force, or upon an execution, out of the custody of him who found them. *Per Holt, C. J. at Hertford*, 5 Ann.

[If a bankrupt leaves plate with his wife, who sends it by her servant with the defendant to a banker's, at whose door defendant takes it, and goes into the shop and pawns it in his own name, and gives his note to repay, and immediately carries the money to bankrupt's wife; it is conversion in defendant, and the assignees shall recover. *Parker v. Godin*, M. 2 G. 2. Str. 813.

But if a bankrupt's wife brings money to defendant, who buys *India-bonds* therewith, and afterwards the assignee seizes part of them, and accepts them as part of the bankrupt's estate, he cannot bring *trover* for the money paid for the others; for he cannot avow the act of purchasing as to part, and disavow it for the rest. *Wilson v. Poulter*, H. 3 G. 2. Str. 859.]

(F) When Trover Does not lie.

BUT *Trover* does not lie without a conversion: as, if goods found are taken out of his custody before any conversion. D. 2 Mod. 243. As, upon an execution, or by violence. *Per Holt, C. J. at Hertford*, 5 Ann.

* One tenant in common of personal chattels cannot maintain *trover* against another, tho' a stranger be joined with the defendant. Thus a member of an amicable society intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain this action against another member and a third person who take it from him. 1 Term Rep. 658.*

If goods delivered to a carrier are stolen; for that is not a conversion. R. 1 Rol. 6. l. 5. *5 Burr. 2825.*

It does not lie by him who has only the possession but no property. 2 Bul. 135.

If A. purchase an annuity ticket, which he does not take a transfer of countersigned, and entered in the office, but has only the name of the vendor indorsed, if the ticket be afterwards sold, and comes by several hands to B. who takes a transfer from the first

* Second
Part of 2
Mod. Ca.

first vendor countersigned, and entered in the office, the executors of *A.* cannot maintain *trover*; for they have no property. *R. Eq. Ca. 45.**

It does not lie against him, who has a property by gift, sale, &c.

* As where a horse is given in exchange for another, which is warranted sound, and proves unsound, *trover* will not lie for the horse given in exchange, for the property is changed by the sale. *Cowp. 814. Doug. 24.**

Nor against one, who has a possession by lawful means: as, if the king's purveyor take beds for the king's servants. *Per Warburton, 1 Rol. 6. l. 7.*

If a master brings a *replevin*, and the servant carry the goods to his master, tho' he had no title, *trover* does not lie against the servant. *R. 2 Mod. 244.*

If a man find a bank bill, and for a valuable consideration deliver it to *A.* *trover* does not lie against *A.* *Per Holt, at Guildb. 1698., Vide 1 Sal. 284.*

If a man purchase goods in market overt, *trover* does not lie against him. *R. Cro. El. 485.*

So, if an innkeeper detain a horse, 'till he be paid for his eating. *R. Per three J. 3 Bul. 270. Dub. 1 Bul. 170.*

If a man pay money, that is stolen, to *A.* *trover* does not lie against him by the owner. *Per Holt, 1 Sal. 284.*

So if he pay tickets, exchequer bills, &c. stolen or lost, for a valuable consideration. *1 Sal. 284. 126.*

[*Trover* will not lie for goods seized and put in the king's warehouse. *Etriche v. an Officer, in Sc'. M. 1720. Bunb. 67.*]

[But the above case is not allowed to be law; *trover* lies for goods tortiously seized by officers of revenue. *Tinkler v. Polk, in B. R. M. 11 G. 3. 3 Wilsf. 146. * S. C. 5 Burr. 2657.**

* Where *A.* and *B.* were partners, and *A.* committed an act of bankruptcy unknown to *B.* *B.* consigned goods after *A.*'s act of bankruptcy to *C.* *bona fide*, for a good consideration, and afterwards committed an act of bankruptcy; on a joint commission sued out against *A.* and *B.* the assignees cannot maintain *trover* against *C.* for the goods so delivered between the times of the respective acts of bankruptcy. If the act of bankruptcy of one partner be considered as a dissolution of the partnership, the assignees deriving under the first bankrupt, *A.* can have no claim upon the partnership effects but what *A.* himself had, which was, to have an account taken, and to have the balance due to him, if any, on that account. *A.* and *B.* were tenants in common; if a creditor of *A.* had sued execution against the partnership effects he can only have the undivided share of his debtor, and must take it subject to the rights of the other partner. The assignees are in the same situation: they are only tenants in common of an undivided moiety, subject to all the rights of *B.* And no action can be maintained by one tenant in common of personal chattels against the other. *Cowp. 450. Vide, Bankrupt, (D).**

(G) The Proceeding in *Trover*.

(G. 1.) The Declaration.

THE declaration is *trover* generally ought to shew the property in the plaintiff.

Yet if it says, *quod Quer. fuit possessionatus*, omitting, *ut de bonis suis propriis*, it is good. *R. Mo. 691. R. Hard. 111.* (G. 1.) Must shew a property in the plaintiff.

If it says, that the tellator *fuit possessionatus*, and made the plaintiff executor; it is sufficient, without saying, that he was possessed. *R. Lat. 214. Vide ante, (B.)*

If the declaration shews, that the plaintiff was possessed *ut de bonis propriis*, it is sufficient, tho' the goods named are things which seem annexed to the freehold; for that shall not be intended, when they are named *de bonis propriis*. *R. 2 Cro. 129.*

So the declaration must express the goods demanded with convenient certainty. (G. 2.) Must express the goods with convenient certainty.

And therefore, if the declaration is *pro diversis vestimentis, diversis libris, &c.* without saying, how many, and of what nature they are, it is bad. *1 Vent. 114.*

Pro ampullis without shewing the number. *2 Lev. 176.*

For *such, and such goods, et aliis utensilibus*, *Angl. implements*, without saying, *quot, aut qualia*. *R. 3 Lev. 18. R. Cro. El. 817.*

Hamis, Angl. hooks, without saying, of what sort. *2 Lev. 11.*

So, for *six tun*, without saying, of what, is bad. *Dan. 25.*

So, for *two pair of pot-hooks*, and (after other words) *hangers*. *R. Ray. 2.*

Pro aliis parvis taniolis, Angl. ribbons, without saying, how many, or, what. *R. 2 Lev. 85.*

So, *pro viginti ovibus, matricibus, et agnis*, without saying, how many ewes, and how many lambs. *R. 1 Vent. 317.*

Or, *pro viginti juvencis, Angl. bullocks and heifers*, without saying, how many of each sort. *Ibid.*

So, tho' the words are explained by an *Anglicé*, it is not sufficient.

As, *trover de quodam instrumento vocat. a gridiron*, is bad; for the *Latin* word does not import it. *R. 1 Sid. 60.*

De hamâ, Angl. a crow of iron. Per three J. 2 cont. *Yel. 68.*

De falsurâ, Angl. a salting-trough; for here is no *Latin* for trough. *R. 1 Sid. 98.*

De duodenis, Angl. gross; for it should be *duodenis duodecim*. *2 Lev. 11.*

De ferramento, Angl. an iron range. *R. 2 Lev. 177.*

*These niceties cannot now have place since the statute ordering law-proceedings to be in *English*.*

But it is sufficient, if there be certainty enough to describe the thing to common understanding. *Vide Dan. 24. Sho. 144.* (G. 3.) But certainty, to a common intent is sufficient.

As, *trover, inter alia, de vase vini*, without saying, of what metal, is good; for it shall be intended *vas ligneum*. *R. 2 Vent. 67.*

Trover

Trover of a set of stones, buttons, &c. R. 2 Vent. 78.

[For a parcel of diamonds, without saying how many. *White v. Greham*, H. 2 G. 2. Str. 827. *Ld. Raym.* 1530. Affirmed in B. R. and in parliament.]

Of letters patent, without mentioning the date. R. *Hard.* 111.

De librario librorum, without saying, how many, or what; for it is ascertained by the word, *library*. *Sho.* 144. 1 Vent. 114.

So, *de plancis granarii*, without saying how many. R. 1 Sid. 98.

De cista vestium; for it is ascertained by the word, *cista*. R. 2 Cro. 664, 5.

De tot paribus velorum et tegulorum, *Angl.* curtains and valence. R. 1 Sid. 445. Vide 2 Sid. 174.

So, *trover de decem arboribus* will be good; tho' properly it is *arbor, dum crescit*. R. Sti. 235.

Of twenty ounces of cloves and mace, without saying how many of each, or that they were mixed. R. 2 Sal. 654.

So, *trover of a piece of cloth, linen, thread, &c.* if the jury can know it so well, as to give damages for it. *Sho.* 144. R. 1 Lw. 303.

[For a piece of *tepee*, without saying how many yards. *Radley v. Rudge*, H. 13 G. Str. 738.]

[For *una parcella segrestium, involuorum et funium*, (*Anglice*, packcloths, wrappers and cords) held well on error. *Bottomley v. Harrison*, T. 2 G. 2. Str. 809. *Ld. Raym.* 1529.]

Trover de provisionibus eidem navi spectantibus. *Sho.* 144.

De scripto suo obligatorio, per quod tenet fuit to A. for it might be given to the plaintiff. R. 2 Sal. 654.

De decem capsis et cistis, without saying, *quot capsae, et quot cistae*; for they are the same things. *Per two J. Cro. El.* 819.

De tribus struibz feni, *Angl.* ricks of hay, without saying, *quot careatae*. R. 1 Lev. 301.

[For 50 *pecis materia quadrata*, (*Anglice*, pieces of square timber-wood) held well, on error. *Hastgrave v. Thompson*, M. 4 G. 2. Str. 810.]

De mensa cum pluteis et abicis, without saying how many; for it is the fashion for a kitchen table. R. *Skin.* 289.

So, *trover of such and such goods*, without saying of what value. *Per three J. 2 cont.* R. 2 Cro. 130.

De armamentis, tormentis, et aliis suppedimentis eidem navi spectantibus, without saying, what in particular; for the goods are ascertained to be such, as belong to the ship. R. *Carth.* 131.

(G. 4.)
So, words
of art, &c.

So it is sufficient, if the goods be expressed by words coined by art: as, *trover de 30 toddis lanae, 20 barrellis cervisiae, &c.* R. 1 Bul. 126.

But it is proper to express such words with, *Anglice*.

So, false *Latin* does not vitiate a declaration.

And if the words are expressed with, *Anglice* or *vocat*, it is well; tho' the words are false or incongruous *Latin*. R. 2 Cro. 129.

So, if the words are sensible, and an *Anglice* be added, which is vicious, it shall be rejected. R. 5 Mod. 178.

Or,

Or, the *Anglicæ* expresses more than the *Latin* word imports.
R. 2 Rol. 254, 5.

And if there be trover for several goods in particular, after a general verdict for the plaintiff, if any particular be not sensibly expressed, the damages shall not be intended to be given for it.
D. 1 Sid. 183. R. Ray. 15. 2 Vent. 78. Acc. 3 Lev. 336. R. 1 Sid. 98. Carth. 131. Vide in Damages, (E. 6.)

So, if any particular be expressed by a word not *Latin*. *R. 1 Sid. 98.*

So if there be convenient certainty, it shall be aided after verdict. *Cro. El. 817. Vide Pleader, (C. 24, 87.)*

So, if the possession be of a single thing and the declaration alledge a conversion of *bona prædicta*, it will be well upon a general demurrer. *R. Lut. 1537.*

So, if any part be insensible, or uncertain, it will be well upon a general demurrer; for the plaintiff may take several damages, and release for this particular. *R. 1 Sal. 218. Vide in Pleader, (Q. 3.)*

If the declaration charge the defendant, that the goods *deveniant ad manus* generally, without saying, *per inventionem*, or how, it is good. *R. after Verdict. Lat. 214. Dan. 23.*

So, if it do not say, that the plaintiff lost the goods. *R. Cro. El. 781.*

But the declaration ought to alledge a conversion.

How a conversion shall be alledged in an action against husband and wife. *Vide ante, (D.)*

So it must alledge the time, and place of the conversion; for it is traversable. *Per two J. 1 Brownl. 8. Cro. El. 97, 8. 78. Vide Pleader, (C. 19, 20.)*

(G. 5.)
 Must alledge a conversion.

(G. 6.) The Plea.

IN trover the defendant can plead nothing, but Not Guilty, or, a release. *Per Twissd. 1 Keb. 305.*

Tho' the trover be against an executor, for goods converted by his testator. *Dub. Sav. 13. * Vide ante (D.)* That trover does not lie against the executor in this case.*

For in many cases, matter of justification amounts only to the general issue. *Vid. Ent. 9, 10. Vide Keb. 305.*

And if the defendant plead a matter which amounts to the general issue, and if the plaintiff demur, and the defendant will not take the general issue, but will join in demurrer, a writ of inquiry shall be awarded. *R. 1 Brownl. 5. 2 Cro. 165, 319. R. 10 Co. 95. a. Vide in Pleader, (E. 14.)*

As, if the defendant plead, a sale to him in market overt, *R. 2 Cro. 165. cont. Cro. El. 485.*

A gift to him by A. who found the goods. *cont. Cro. El. 262. R. acc. Lat. 185, 6.*

A sale to him by A. who did not deliver them, but afterwards sold them to the plaintiff, who lost them, and the defendant found the goods. *R. 2 Cro. 319.*

Property

Property in himself who lost them, and the plaintiff found them, and afterwards lost them, whereby he seized them. *R. Cro. El.* 146.

Seizure as a waife. *R. Cro. El.* 174.

Taking as tithes severed. *R. Cro. Car.* 157. *R. 10 Co.* 88. *b. Lat.* 185.

Taking for toll. *Semb. Jon.* 240.

Detainer 'till paid for salvage. *2 Sal.* 654.

He may plead not guilty *infra 6 annos. Lut.* 99.

[Defendant cannot justify detaining goods till money laid out on them is paid; but it may be deducted in the damages. *Stone v. Linnwood. M.* 12 *G. Str.* 651.] *This is a *nisi prius* case; *Qu.* whether it be law. *1 Morg. Vad. Mec.* 315.*

[If defendant pleads *non assumpsit*, and there is verdict for plaintiff, judgment shall be arrested. *Barnes* 439.] **Qu.* Whether a repleader ought not to be awarded. *1 Morg. Vad. Mec.* 315.*

ACTION upon Statute.

(A) When it lies.

(A. 1.) For a Recompence.

UPON every statute, made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the statute, or by implication. *2 Inst.* 55, 118. *10 Co.* 75. *b.*

And such action shall be, for a recompence to the party, or, by way of prohibition.

* And it has been held in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action; for in penal actions no costs are allowed; but if the action be brought by the party grieved, he is entitled to costs. *2 Term Rep.* 154, 155.*

By the *st.* 36 *Ed.* 3. 9. if any man find himself grieved contrary to the articles above written, or others contained in divers statutes, and will come to the *chancery*, and complain, he shall there have remedy by force of the said statutes, *viz.* by original writ out of *chancery.* *2 Inst.* 55.

And therefore, where by the *St. M. Ch.* 9 *H.* 3. 29. it is enacted, *Quod nullus liber homo capiatur, vel imprisonetur, &c. nisi per legem terrae*, if any be imprisoned contrary to law, he may have an action founded upon this statute. *Ibid.*

So, a man aggrieved contrary to the *St. M. Ch.* 9 *H.* 3. 35. which enacts, *Quod vicecomes non faciat turnum suum nisi bis in anno*, &c. shall have an action upon this statute, tho' no action be expressly given. *2 Inst.* 74. *F. N. B.* 161. *D.*

So,

Vol.

So, upon other clauses of *M. Ch.* 2 *Inst.* 55. 74.

Or, contrary to the *st.* of *Marl.* 52 *H.* 3. 10. if a man be distrained to come to a leet, who need not. 2 *Inst.* 122. *F. N. B.* 160, 161. *D.*

So a man shall have an action upon the *st.* of *Marl.* 52 *H.* 3. 15. if he be distrained out of the fee or in the highway, contrary to this statute. 2 *Inst.* 131, 104.

So a demandant or plaintiff, a tenant or defendant, who is delayed, or prejudiced by the sheriff's returning jurors, who are above 70 years of age, infirm, or not commorant in the same county, may have an action for it upon the *st.* *W.* 2. 38. 2 *Inst.* 447.

So an action upon the statute lies for the party grieved upon every remedial branch of the *st.* *W.* 2. for his relief. 2 *Inst.* 486.

So an action lies upon the *stat.* of *Oblivion* 12 *Car.* 2. 11. for the penalty, against him, who speaks words to revive the memory of the late differences. 1 *Lev.* 26.

(A. 2.) For Recovery of an Advantage.

So an action lies upon the *st.* 31 *H.* 8. and 32 *H.* 8. for money devised to be paid out of lands; for in all cases, where a man has an advantage given to him by force of an act of parliament, he shall have a remedy for it by common law, without the aid of a court of equity. *Per Holt, Mod. Ca.* 26.

And the action upon the statute shall be maintained against the terre-tenant. *Mod. Ca.* 27.

(A. 3.) What Averments are necessary in an Action upon a Statute.

If an action be founded upon a statute, the plaintiff must aver every matter, which is requisite to entitle him to an action. *Vide in Pleader,* (C. 76.)

But where, by the proviso in a statute a person is excepted within such circumstances, and not in the body of it, the plaintiff need not shew, that he is not within the exceptions; for that shall come from the other party. *Semb.* 1 *Lev.* 26.

(A. 4.) By Way of Prohibition.

So, sometimes the party aggrieved contrary to a statute shall have a remedy by action upon the statute, by way of prohibition; as, if a feoffee be distrained, for several services, which are not contained in his charter of feoffment, contrary to the *st.* of *Marl.* 52 *H.* 3. 9. he shall have a writ of *contra formam feoffmenti*; which is a prohibition to the lord, or his bailiffs to distrain him. 2 *Inst.* 118. *F. N. B.* 162. *F.*

(B) When an Action does not lie upon a Statute.

BUT if a statute prohibits a thing to be done, an action does not lie against him, who proceeds in a course of law to contend, whether such a thing be prohibited, or not.

As, if a man sue in the spiritual court for tithes of gross trees, an action does not lie upon the *st.* 45 *Ed.* 3. 3. which enacts, that tithes shall not be paid of them; nor upon the *st.* 32 *H.* 8. 7. which enacts, that none shall sue for them; for a man may contend, whether the trees, of which the tithes are demanded, are gross trees, or not. *R.* 2 *Cro.* 133.

(C) When an Action lies upon Statute, or at Common Law.

SO, if a statute gives a remedy in the affirmative (without a negative expressed or implied) for a matter which was actionable by the common law, the party may sue at the common law, as well as upon the statute; for this does not take away the common law. 2 *Inst.* 200.

As he may have trespass for spoiling his park at the common law, or, an action upon the statute *de malefactoribus in parais.* 2 *Rol.* 49.

Trespass for taking his ward, or, ravishment of ward upon the statute. 2 *Rol.* 49.

Trespass for mayhem, or, appeal of mayhem upon the statute. *Ibid.*

If the action concludes, *contra formam statuti* (where it lies at the common law, or upon a statute) and the statute is mistaken, whereby the declaration will be bad upon the statute, but good by the common law; the words, *contra formam statuti* shall be rejected. *R. P.* 9 *W.* 3. *inter Bennet and Talbois* (reported *Comyns's Reports* 26.)

So, if there be no statute, and the action is maintainable only by the common law. *P.* 9 *W.* 3. (reported *Comyns's Reports* 26.)

So, if an indictment be against three, and one only is within the statute; it shall be good against the others at the common law, and *contra formam statuti* goes to him only, who was guilty within the statute. *Ibid.*

But if a man bring his action at the common law, he waives his remedy by the statute. 2 *Rol.* 49.

(D) When it does not lie in the Courts of Westminster.

BY the *st.* 21 *Jac.* 4. all offences to be committed against any penal statute, for which any informer may ground any action, suit, information, &c. before justices of assize, nisi prius gaol-delivery, oyer and terminer, or justices of peace in quarter sessions

sessions, shall be sued before the justices of assise, *nisi prius*, gaol-delivery, *oyer and terminer*, or justices of peace of every county, borough, &c. having power, &c. wherein such offence shall be committed, at the choice of the parties, who will sue, and not elsewhere: and all informations, actions, &c. hereafter commenced by the attorney general, a common informer, or other person in any of the courts of *Westminster*, for any of the said offences, shall be void.

And therefore, debt does not lie in the courts of *Westminster* for an offence within another county, tho' it cannot be sued elsewhere; for the offence may be prosecuted before justices of assise, &c. tho' not by such action. 4 *Inst.* 172. *R. cont.* 1 *Vent.* 8. 1 *Sid.* 400. *Dub. Lut.* 165. *R. acc.* 1 *Sid.* 401. *Semb. cont.* *Lat.* 192. *R. acc. per eleven J.* 10 *W.* 3. 1 *Sal.* 373. *R. cont.* 3 *Lev.* 71. *R. cont.* 2 *Mod.* 246. **Vid.* 2 *Harwk.* 384. 5 *Mod.* 425.*

So an information does not lie in the courts of *Westminster*, where it can be brought before justices of assise, &c. *Semb.* 2 *Cro.* 85. *R. Carth.* 465. 1 *Sal.* 372.

But the *st.* 21 *Fac.* 4. by a proviso in the same statute, does not extend to any information or action upon statutes against popish recusants, or for recusancy, or for maintenance, champerty, or buying of titles, or on the *st.* of tonnage or poundage, or for defrauding the king of his customs, subsidy, impost, prisage, or for transporting gold, silver, ordnance, ammunition, &c. wool, or leather.

So it does not extend to an information for an offence not determinable before justices of assise, &c. as, upon the *st.* 23 *H.* 8. 4. for raising the prices of beer, &c. *R. Cro. Car.* 112. *Hut.* 98. *Carth.* 465, 6.

Or, upon the *st.* 21 *H.* 8. 13. for non-residence. *R. Cro. Car.* 146.

So it does not extend to debt upon any subsequent statute, which gives a remedy by debt. 1 *Sal.* 373. but *per Holt*, it must be laid in the proper county. 1 *Sal.* 373. *Vide Action*, (N. 10.)

*By 31 *El. c.* 5. *f.* 7. all suits for using unlawful, or not using lawful games, &c. or for using a trade without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace, or assises, of the same county where the offence shall be committed, or otherwise, inquired of, heard and determined in the assises, or general quarter sessions of the peace of the same county where such offence shall be committed, or in the leet within which it shall happen, and not in any wise out of the same county where such offence shall happen or be committed.*

*But this clause does not restrain an information in the king's bench or exchequer, for such offences happening in the same county where those courts are sitting; the negative words not being that such suits shall not be brought in other courts, but that they shall not be brought in any other county; and the prerogative

tive of these high courts shall not be restrained without express words. 2 Hawk. 382.*

The sessions may proceed on this clause by information as well as indictment. Cowp. 370.

[In a *qui tam*, for exercising trade without apprenticeship, laid at Cambridge, B. R. staid proceedings. *Smith v. Potter*, H. 7 G. Str. 415.] *The stat. 21 Jac. 1. c. 4. restraining the jurisdiction of B. R. to actions arising in the county where it sits. Salk. 373.*

(E) Action upon Statute, by *Qui tam*, &c.

(E. 1.) How it shall be brought.

(E. 1.)
By information, or original.

ACTIONS upon statute are, at the suit of the king only, viz. by indictment, or information. Of which, *vide Indictment*, (A.)—*Information*, (A. 1.)

Or, at the suit of the party *qui tam pro domino rege quam pro seipso sequitur*; or, at the suit of the party alone. *Vide Information*, (A. 3.)

*Where an appropriated penalty is given, and no method prescribed in which it shall be recovered, it is a debt due to the crown, and can be sued for only in a court of revenue, and not by indictment. *Rex v. Malland*. Str. 828.*

Where the statute gives half the penalty to the informer and half to the poor of the parish, The declaration may be either, "To render to the informer," or, "To the informer and the poor." And so may the judgment. *Frederick v. Lookup*, H. 7 G. 3. 4 B. M. 2018.]

[So, an informer may bring an action in his own name, without *qui tam*, for a forfeiture whereof a moiety goes to turnpike. *Barnes* 471.]

If a statute gives a penalty to every one, who will sue, an action lies by *qui tam*, &c. 3 Leo. 237.

So, if a statute gives a moiety of the goods to him, who seizes, an action lies, before seizure, by *qui tam*, &c. R. Sav. 7.

*It seems to be settled, that it is in the election of him who brings an action on a penal statute which gives one moiety of the forfeiture to the king, and another to the informer, either to have a writ against the defendant, *quod reddat domino regi et A. B. qui tam*, &c. *quas eis debet*; or to have it in this form, *quod reddat A. B. qui tam*, &c. *quas ei debet*. It seems likewise to be settled, that whether the writ be in one form, or the other, it is well pursued by a declaration in the name of the plaintiff only. 2 Hawk. 379.*

*And there seems to be no necessity that either the writ or count should express that it is brought for the king as well as the party. *Id. Ibid.**

By the *st.* 18 Eliz. 5. (which does not extend to suits by persons to whom or to whose use any forfeiture, penalty, or suit is specially limited by any statute, but where it is limited generally

to him that will sue) none shall be admitted to pursue against any person upon any penal statute, but by information, or original action, and not otherwise.

And therefore, none can sue upon a penal statute by plaint in an inferior court. *R. Cro. El. 544. Mo. 412. 600. R. Sti. 383. (a)*

Nor, by bill of debt in *B. R.* *R. Cro. El. 77. R. Mo. 247, 8. 412. R. 1 Rol. 537. l. 30. (a)*

Nor, by bill in the *exchequer, quo minus, &c. Semb. 3 Leo. 237.*

But, where a statute gives a penalty to be recovered by action of debt, bill, plaint, or information, an action by *qui tam* may be by bill in *B. R.* as well as by original, or information; for the words of the *st. 18 El. 5.* are (*Original Action*), and the bill in *B. R.* is an original action there. *R. 1 Rol. 537. l. 15.*

So, an action by the party grieved upon a penal statute, may be by bill in *B. R.* for the *st. 18 El. 5.* does not extend to him: as, in an action upon the *st. 32 H. 8. 9.* against maintenance. *Vide 3 Leo. 237.*

*But where the party particularly grieved by an offence against a statute, sues for a forfeiture generally limited to any one who will sue for it, he seems to be as much within the restraint of the said statute, as if he were not the party grieved. *2 Hawk. 381.**

Or, upon the *st. 5 Eliz. 9.* against perjury. *R. Cro. El. 434.*

So, debt upon the *st. W. 2. and 1 R. 2. 12.* against a sheriff for an escape lies in *B. R.* by a bill against him *in custod. mar.* tho' the statute limits the recovery by writ of debt, which imports an original; for it is within the equity of the statute. *R. 1 Rol. 536. l. 50.*

So an action upon the *stat. of præmunire* lies by bill, tho' the statute speaks of garnishment by the space of two months, which implies, by original. *1 Rol. 537. l. 3. 3 Infl. 125.*

So, an action upon the *st. 13 R. 2. 5. and 2 H. 4. 11.* for suing in the admiralty, where the cause arises upon land; tho' the statute speaks of a writ *super casum.* *1 Rol. 537. l. 5. Cro. Car. 603.*

So, an action upon the *st. of Winton, 13 Ed. 1.* against an hundred; for the inhabitants may be *in custodia marischalli.*

[On motion, proceedings shall be staid till the plaintiff gives notice of his place of abode; if he is out of the realm, proceedings shall be staid till his return, or till security given for the costs. *Vat. v. Green, P. 12 G. Str. 697.*]

(a) Note; The law of these two cases seems very doubtful; for as appears by the cases below, the contrary has been expressly adjudged, as to such statutes as give expressly a recovery by bill or plaint; and a suit by bill or plaint is an original action, in the court in which it is commenced, and therefore may reasonably seem to be within the intent of the statute, only where it is removed into a superior court, and there proceeded upon. And if this be the case, there seems no reason why any suit whatever, by bill or plaint on any penal statute, can be within the purview of this statute of *Eliz.* while such bill or plaint continues in the court in which it was commenced, whether the statute on which it was brought, expressly give those remedies, or leave the method of suing to the general construction of law. *2 Hawk. 380.* Besides the statute of *Jac.* above cited seems to take it for granted that actions on penal statutes may indifferently be brought by writ, bill, plaint or information. *Id. Ibid.*

[Plaintiff]

[Plaintiff's attorney may be ordered to give defendant an account of plaintiff's place of abode, even after trial and point reserved. *Barnes* 126.]

[The declaration may be *qui tam*, tho' the bill of *Middlesex* is not so. *Weavers Company v. Forrest*, T. 18 G. 2. *Str.* 1232.]

[But if process is *qui tam*, and declaration not, it is irregular, for it alters the nature of demand. *Barnes* 494. *Vide Abatement*, (G. 8.)

*It has lately been determined by *B. R.* that on a general writ, the plaintiff may declare as executor or administrator, &c. but not *vice versa*: so that the practice of both courts, is now settled to be uniform in this respect. 2 *Morg. Vad. Mec.* 193.*

*By *st.* 21 *Jac.* c. 4. *st.* 3. no officer, &c. shall receive, &c. any information, bill or plaint, count or declaration, grounded on any penal statute, which before, by this act, are appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a corporal oath before some of the judges of the court, that the offence or offences laid in such information, action, suit or plaint, was or were not committed in any other county than where by the said information, &c. the same is or are supposed to have been committed, and that he believeth in his conscience, the offence was committed within a year before the information or suit within the same county where the said information or suit was committed, the same oath to be there entered of record.*

*Proceedings in a penal action on any statute before the 21 *Jac.* will be staid on motion, because no affidavit had been filed according to the directions of this act; notwithstanding the uniform practice had been to file no affidavit: for an act of parliament cannot be repealed by *non-user*, and a motion seems to be the proper mode of taking advantage of this objection. 2 *Term. Rep.* 275.*

*But this does not extend to any subsequent statute, for [an affidavit of the cause of action accruing within a year need not be filed in an action on statute of usury, 12 *Ann.* *st.* 2. c. 16. *French v. Coxon*, M. 11 G. 2. *Str.* 1081.]

In what county it shall be brought, *Vide Action*, (N. 10)–*Ante*, (D.)

As to information by *qui tam*, &c. *Vide Information*, (A. 3)

(E. 2.) When an Action lies by *Qui tam*, &c.

An action by *qui tam*, &c. was brought against *B.* before whom he was indicted of felony, for not allowing his pardon 'till submission to the duke of Lancaster. 27 *Ed.* 3. 1 *Rol.* 1. *A.*

If a man be rescued, when taken upon a *capias utlagatum* at the suit of *A.* he may have an action *qui tam*, &c. *R.* 11 *Jac.* 1 *Rol.* 1. *l.* 15.

So, if he escape, an action lies against the sheriff by *A.* *qui tam*, &c. *R. Cro. El.* 877. *R.* 2 *Cro.* 361. 1 *Rol.* 78.

So, if a sheriff refuse to execute a *capias utlagatum*, and return *non est inventus*. *R.* 2 *Cro.* 533. *Noy* 22.

Yet, for such escape, &c. the party may have an action, without saying, *qui tam*, &c. *R. Lut. 123. Vide Cro. El. 652. Mo. 641.*

So an action lies by *qui tam*, &c. in every case of a contempt to the king. *Mo. 64.*

So an action by *qui tam*, &c. lies, for a battery of the king's chaplain in his presence.

So it lies in every case, where the damage is to the king, as well as to the party. *D. 2 Rol. 26.*

So an action upon a statute, which prohibits a thing, but does not give any penalty, must be by *qui tam*, &c. and not by the party alone: as, upon the *st. 32 H. 8. 7.* which prohibits the suing for tithes of grofs trees. *R. 2 Cro. 134.*

Upon the *st. 2 R. 2. 5. de scandalis magnatum. 1 Rol. 78. R. 4 Co. 13. a.*

Upon the *st. 13 R. 2. 5. and 2 H. 4. 11.* for suing in the admiralty, &c. *R. Dy. 159. b. Mo. 64.*

Upon the statute of usury. *Dy. 95. a.*

Upon the statute of apparel. *Mo. 36.*

An action by *qui tam*, &c. must be *ad respondendum parti qui tam pro domino rege quam pro seipso sequitur.* *Cro. Car. 256. Jon. 261.*

Or, *ad respondendum domino regi et parti qui tam*, &c. *R. Cro. Car. 256. Dub. Mo. 64. R. acc. Jon. 261.*

But an information shall say only, that the party, *qui tam pro rege quam pro seipso sequitur*, &c. *Cro. Car. 256. Jon. 262.*

If the action be by the king and the party, but the king is not to have any part of the sum recovered, but only his fine, *qui tam*, &c. may be omitted in the issue, and *venire facias.* *R. Cro. Car. 336.*

So, if an action be by *qui tam*, &c. and the issue be joined, *quod non debet* to the party only, it is good. *R. after verdict. 3 Lev. 375. Semb. cont. Hob. 327.*

So, if demurrer be joined to a declaration only by the party *qui tam*, &c. *Cro. Car. 11.*

An action by *qui tam*, &c. is the suit of the informer, and not of the king. *Lut. 196. Vide Information, (A. 3.)*

And the party *qui tam*, &c. may be non-suited. *3 Lev. 398. Sav. 56.*

Shall pray a *tales*, tho' he has no warrant by the attorney general. *3 Lev. 398.*

A conviction upon an indictment, &c. will be a bar to an action by *qui tam*, &c. *Lut. 202, 208.*

The attorney general cannot enter a *nolle prosequi.* *R. Cro. El. 138. 11 Co. 65. b. Except for the king's part. Cro. El. 583.*

It must pursue all the requisites by *st. 18 Eliz.* in the case of a common informer. *1 Sal. 30.*

Shall not be discontinued by the demise of the king. *R. Hutt. 82. Cro. Car. 10. R. 3 Lev. 207.*

If the *qui tam*, &c. die after verdict, his executor or administrator shall have judgment for his moiety. *R. Hard. 161. if he dies after judgment, and his death is suggested upon the roll.*

So,

So, the defendant may plead privilege as an attorney of another court. *R. Lut.* 193. 3 *Leo.* 398.

May have *nisi prius* by proviso. *Semb.* 2 *Leo.* 110.

[It is in the discretion of the court whether they will give leave to compound; and they refused it in an action for selling gold rings of less fineness than *stat.* 18 *Eliz.* c. 15. directs. *Howell v. Morris*, *M.* 18 *G.* 2. 1 *Wilf.* 79.]

*But they granted leave to compound in a prosecution on the *stat.* against gaming. *Id.* 130.*

[If *qui tam* is brought by party injured, the court cannot give leave to compound. *Barnes* 462.]

[After verdict, leave to compound is never given. *Ibid.*]

[On affidavit of defendant's poverty, the court will give leave to the prosecutor *qui tam* to compound with the defendant, tho' in execution. *Bradshaw v. Mottram*, *P.* 5 *G.* *Str.* 167.]

[On leave to compound a penal action, the king's half of the composition shall be paid to the master of the crown-office, for the king's use. *Brown v. Bailey*, *M.* 7 *G.* 3. 4 *B. M.* 1929.]

(F) Action upon Statute by the Party grieved; when it shall be.

IF by a statute a penalty be expressly allotted to the party grieved, he alone may sue for it, without saying *qui tam*, &c. as, upon the *stat.* 1 & 2 *Ph.* & *Mar.* for driving a distress out of the county.

So upon every statute, which gives a penalty to the party grieved.

So, if it do not give any certain penalty, but damages generally to the party grieved.

So, though it do not limit the forfeiture to the party grieved, if it give the penalty, or forfeiture, in respect of the wrong, or dispossession to the property of the owner, and do not limit it to any other: as upon the *stat.* 2 *Ed.* 6. 13. which says, none shall carry away tithes, before he hath set forth the tenth part of the same, or agreed for it with the owner, under pain of forfeiture of treble value. 2 *Inst.* 650. *Vide Dett.* (A. 1.)

So, if a statute provide a remedy for the party grieved, though it do not give any express penalty or forfeiture, he may have an action upon the statute. 2 *Inst.* 486.

As, upon the *stat.* *W.* 1. 20. against misfeasors in parks or fish-ponds, the owner may maintain an action in his name alone, as well as by *qui tam*, &c. 2 *Inst.* 200.

So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law. *Per Holt*, *Mod. Ca.* 26, 27.

An action by the party grieved is not within the *stat.* 18 *Eliz.* 5. as a common informer. 1 *Sal.* 30. *R.* 1 *And.* 116.

(G)

(G) When a Statute shall be Recited.

IF an action lies for an offence at common law, and afterwards a statute is made against the same offence, if the action is brought upon the statute, the statute must be rehearsed; otherwise it does not appear, whether the action be upon the statute, or at common law. *Lut.* 1548.

As, in an action upon the *ft.* 5 *R.* 2. and 8 *H.* 6. for a forcible entry, or detainer. *Lut.* 1548.

In an action upon the *ft.* *W.* 1. 20. *De malefactoribus in parvis.* *Lut.* 1548. 2 *Inst.* 200.

So, if a statute make a new offence, which was not so by the common law, the statute must be recited.

As, in waste against tenant for life, or years. *Reg.* 73. *Lut.* 1548.

(H) When it need not.

BUT if a statute extend a remedy, which was at common law in some particulars, it need not be recited. *Dy.* 83. *b.* 85. *a. b.*

As, in waste against a tenant in dower or guardian, the statute need not be rehearsed; for there was a prohibition of waste against them at common law. *Reg.* 73. *Lut.* 1548.

So, in debt by an executor, or administrator *de bonis assortatis* &c. the statute is not rehearsed; for debt lay at common law in other cases. *Lut.* 1548.

So, in an action upon the *ft.* 2 *R.* 2. 5. *de scandalis magnatum*, the statute need not be recited. *R.* 2 *Mod.* 99. *Vide action upon the case for defamation*, (B. 3.)

In an assise for tithes, the *ft.* 32 *H.* 8. 7. need not be rehearsed. *Dy.* 85. *a. b.*

So, the title or preamble need not be mentioned. *Mod. Ca.* 62. *Sal.* 609.

So, where a statute gives a writ, and ordains the certain form of the writ, the statute need not be rehearsed. *Bro. Parl.* 75. *Lut.* 1548.

So, if the action be not founded upon a statute directly, but upon a collateral fact, the statute need not be recited: as, in a *quare impedit* by the king upon a simoniacal contract, the *ft.* 21 *Eliz.* 6. need not be recited. *Lut.* 1093.

When a statute need not be recited, it is sufficient, that the plaintiff in his declaration shews his case to be within the purview of the statute, and concludes *contra formam statuti*. *Semb. Lut.* 202, 208, 212. 1 *Sal.* 212.

If he misrecite the beginning of the statute, and conclude *contra formam statuti* generally it will be well. *Semb. Cro. Car.* 232. *Vide post*, (I.)

If it be founded upon several statutes, *contra formam statuti* is bad. *Lut.* 212.

So,

So, *contra formam statutorum*, where it is founded only upon one. *R. Yel. 116. Vide Pleader, (2 S. 10.)*

But, where an offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory, it is sufficient to say, *contra formam statuti*; as, in an action against the hundred. *Yel. 116. Vide Pleader, (2 S. 10.)*

In an information for 20*l. per mensem* for not coming to church; for several statutes require the resorting to church, but the *23 Eliz.* only gives the 20*l. per mensem*. *R. 3 Lev. 61.*

If there be debt by an assignee for a debt to a bankrupt, *vigore statuti*, is sufficient. *R. 2 Bul. 26.*

So, if a declaration conclude *contra formam statuti*, where there is no statute in the case, it will be surplusage. *1 Sal. 212.*

If a declaration conclude so, where there are several trespasses and only part within the statute, the words, *contra formam statuti*, shall be applied only to that part. *R. 1 Sal. 212.*

(I) How a Statute shall be Recited.

IF an act of parliament be recited or pleaded, the day, year, and place of the making of it must be shewn.

If the plea mistake the day of the commencement, or conclusion of the parliament, it will be bad. *Semb. Cro. Car. 232.*

Though it be in a private act, and *nul tiel record* is not pleaded; for the court *ex officio* will take notice of the commencement, prorogation, and every session of parliament, and consequently, (if they are mistaken,) that there is no such act. *R. 1 Lev. 296.*

And if the session was held by prorogation, the shortest and surest way of pleading is, *ad sessionem parliament. tent.* such a day, and year, in such a place. *2 Cro. 111. Lut. 140, 1409.*

For, if the parliament commenced *quinto Elizabetha*, and was prorogued *ad octavum Eliz.* and then the act passed if it be pleaded, *ad parliamentum tentum octavo Eliz.* it is bad. *R. Pl. Com. 79. a. R. 2 Cro. 111, 139. Cont. Dy. 95. a.*

[Plea of an act of insolvency of 2 G. whereas the parliament began 1st George, held naught. *Ibotsham v. Cook, M. 5 & 6 G. 2. Fort. 372.*]

[Plea of an act of 8 & 9 W. bad; it must be of the 8th year, in which the session began, *Nutt v. Stedman, H. 8 G. 2. Fort. 372.*]

So, where the parliament was summoned 23 Jan. 1 Eliz. and, then prorogued to 25 Jan. if it be pleaded, that by a statute *in parlamento inchoat* 23 Jan. *et tunc prorogat* usque 25 Jan. *edit*, it is bad; for the parliament did not commence 'till 25 Jan. *R. Dy. 203. a.*

So, if it be pleaded by a statute made 2 Nov. 2 & 3 Ed. 6. it is bad; for the same day cannot be in two years. *R. Mo. 302.*

So, if a statute be pleaded to have been made 29 Eliz. where the parliament commenced 28 Eliz. it will be bad. *R. 3 Lev. 333. R. 1 And. 295. Vide Lut. 1117.*

Or, at a session 18 Feb. 14 Car. where the prorogation was to 18 Feb. 15 Car. *Semb. Ray. 191.*

So if a declaration be upon a general statute, and conclude *contra formam statuti* made 2 H. 8. where it was made in another reign, or in another year of the same king, it will be bad. *Sav. 42.*

[A mistake in the commencement of the parliament is cured by concluding *contra formam statuti in eo casu editi et provis.* *Wendham v. Palgrave, M. 6 G. Fort. 372. Str. 214.*]

It is sufficient, that so much of a statute is recited, as concerns the matter in question; and therefore, if it be said, *inter alia inactitatum fuit*, it is well. *R. Pl. Com. 65. a. Vide in Pleader, (2 S. 3.)*

If the party recite so much of a statute, as makes for him, it is sufficient; though he omit a proviso, or other clause, that makes against him. *R. Pl. Com. 105. a. R. 2 Cro. 139.*

If, in the recital of a statute there be a material variance, it is bad; as, if the time or place of the making of it be mistaken. *R. Lut. 140. Vide supra.*

If it be recited in conjunctive words, where it is in disjunctive. *R. Cro. El. 96. 697.*

If the party recite the title of an act, and it be mis-recited; though the recital was not necessary. *R. Mod. Ca. 62, 3. 2 Sal. 609.*

So, if he recite the *fl. 5 El. of perjury, quod quilibet, &c. admitteret et forisfaceret, &c. for, amitteret.* *R. 2 Cro. 133.*

If in a recital of the *fl. 8 H. 6. 9.* if any feoffment or discontinuance thereof be made, *thereof*, be omitted. *R. Cro. El. 697.*

But a small, or immaterial variance does not prejudice. *2 Bul. 47, 51.* as, if an act say, if a recovery be *in aliquibus curiis*, and it is recited, *in aliquâ curiâ.* *R. Cro. Car. 523.*

[So, in an action on 9 G. 1. c. 22. declaration for *feloniously* setting fire to two stacks of oats, is good, tho' the words of the act are *unlawfully and maliciously.* *Allen qui tam v. Hundred of Kirton, M. 13 G. 3. 3 Wils. 313.*]

So, where it is a material variance from a general statute, if the declaration conclude *contra formam statuti in hujusmodi casu editi*, and not, *contra formam statuti prædicti*, it is well. *Lut. 140. Vide Pleader, (2 S. 10.)*

So, if the defendant justify by force of a general act, and conclude, *contra formam statuti 6 Eliz.* where it was *temp. Ed. 6.* it will be good. *R. 1 Brownl. 196.*

So, if the declaration mistake the day, or year, of the statute. *Per Shute. Sav. 42.*

So, if a statute mis-recited in the commencement, &c. be admitted by the plea, &c. it shall not afterwards be assigned for error. *R. 2 Cro. 139.*

As to amendment in actions and informations on penal statutes, *Vide Amendment, (2. C. 2.)*

A D D I T I O N.

Vide Abatement, (E. 22. F. 22, &c.—H. 4.) Pleader, (C. 9.)

ADJOURN.

ADJOURNMENT

ADJOURNMENT.

(A) Adjournment of the Term.

(A. 1.) When it may be.

ADJOURNMENT of the term is, when it is prolonged to another day, or place. *Terms de Ley verb. Adjournment.* Jon. 85.

The C. B. shall not be removed without notice by adjournment.

So B. R. and the court of pleas in the *exchequer* shall also be adjourned. 4 *Ed. 4. 21. a.*

An adjournment may be to another day or return, with a proviso, that there shall be no proceedings upon demurrer, special verdict, or hearing for judgment, but only for motions, continuance of process, and joining of issues. *Cro. Car. 11.*

When the terms begin, &c. *Vide in Temps, (C. 1. &c.)*

(A. 2.) How it shall be.

The adjournment of the term shall be by a writ of adjournment. 4 *Ed. 4. 20. b.*

And, if the king issue a proclamation for the adjournment of the term, that warrants the chancellor to issue a writ for the adjournment. 1 *And. 279.*

Or, there may be a proclamation to give notice of the adjournment. *Jon. 84. Cro. Car. 11.*

The writ shall be read in the court by the puisne judge there, after three proclamations made to hear it, and then the cryer repeats the effect in *English*, and the court rises. *Cro. Car. 12, 13. Dan. 244. Dy. 225. b.*

And it shall be read upon the effoin day of the return, from which it is adjourned. *Jon. 84. Cro. Car. 13. Dy. 225. b.*

And the court may hear motions, &c. the same day. *Jon. 84. 4 Ed. 4. 21. a.*

The court ought to sit the *quarto die post* of the return, to which the adjournment is made. *Dan. 244. Cro. Car. 14. 2 Cro. 129.*

Unless there are special words in the writ. *Vide Dan. 244.*

(A. 3.) The Effect of an Adjournment.

The adjournment of the term does not adjourn the *Chancery*. *Dan. 243. 4 Ed. 4. 21. a.*

But it may be prohibited from hearing of causes, by proclamation. *Cro. Car. 11.*

If the term be adjourned from one return to another, it shall be taken *exclusive*; for the return, *from which*, is not adjourned:

as, if the adjournment be from *Oâ. Mich.* to *Mens. Mich.* the adjournment does not commence 'till the morrow after the fourth day from *Oâ. Mich.* 1 *Rol.* 130. l. 27, 30. *Jon.* 85. 2 *Cro.* 16. *Cro. Car.* 12.

And an appearance upon *Oâ. Mich.* is well, and shall be entered. *R.* 1 *Rol.* 130. l. 30.

So, at the return to which it is adjourned, the justices sit at the effoin. 2 *Cro.* 17.

And *B. R.* may sit before the *quarto die post*; for they proceed *de die in diem.* 2 *Cro.* 17.

C. B. where process is returnable only at the common return, do not sit till the *quarto die post.* 2 *Cro.* 17.

But where the return itself is adjourned, nothing can be done upon the same return: as, if the term be adjourned in *Oâabis Mich. usque Mens. Mich.* there can be no appearance upon *Oâ. Mich.* for that was adjourned. 1 *Rol.* 130. l. 33. 4 *Ed.* 4. 21. a.

So the effoin cannot be upon *Oâ. Mich.* for that return does not begin. 1 *Rol.* 130. l. 35.

So an infant cannot be inspected, tho' he will be of full age before the day to which the adjournment is made, without consent. 1 *Rol.* 130. l. 20. *Semb. cont.* 2 *Cro.* 230. *Semb. acc.* 2 *Cro.* 445, 6.

So, if the continuance be *de Oâ. Mich. ad Oâ. Hill.* the plea will be discontinued; for all continuances must be *ad Mens. Mich.* and *de Mens. Mich. ad Oâ. Hill.* *R.* 1 *Rol.* 130. l. 10. 2 *Cro.* 445.

So every thing to be done at a return which was adjourned, shall be done at the day to which the adjournment was: as, if a bond be to appear *Oâ. M.* before which the term is adjourned to another place and day, an appearance there is sufficient. *R.* *Mo.* 430. *Cro. El.* 466.

If there be an adjournment of all writs, pleas, &c. a plea by bill in *B. R.* shall not be adjourned. 1 *Rol.* 130. l. 38.

If there be an adjournment *ad Quind. Mich. apud Windsor,* it cannot be adjourned *usque Quind. Mich.* from *Windsor* to *Westminster*; for the session at *Windsor* was the *quarto die post*, and the same return cannot be afterwards adjourned in part. 1 *Sid.* 276.

Adjournment of Assise.

Vide Assise, (B. 25.)

Adjournment to, and of Parliament.

Vide Parliament, (L. 6.—N.)

A D M E A S U R E M E N T.

Admeasurement of Dowry. *Vide Dowry.* of Pasture. *Vide Common, (1.)*

A D M I N I S T R A T I O N.

(A) Administration.

By whom it shall be.

By an executor or administrator.

THE administration of the personal estate of every person, after his death belongs to his executor, or administrator.When, by whom, to whom, and how administration shall be granted, *vide Administrator, (B. 1. &c.)*Who shall be executor *de son tort*, and how charged, *vide Administrator, (C. 1. &c.)*

(B) Executor.

(B. 1.) How appointed.

BUT a man, who makes a will, may thereby make his executor.And any words, that denote the intent of the testator, that from an one shall have the care of his personal estate, are sufficient to constitute him his executor: as, if he wills, that *A.* shall have the administration of his goods. *Went. Off. Exr. 12.*That *A.* shall have his goods to pay his debts, &c. *Off. Exr. 12.*That *A.* shall have the residue of his goods, after his legacies, if he gives security to perform his will. *Off. Exr. 13.*That *A.* shall be overseer, and shall have the rule and disposition of his goods, and payment and receipt of his debts during the non-age of his executor: he shall be executor during the infancy of the other. *Ibid.*Or, that none shall have any dealing with goods, except *A.* during the minority of his son. *R. Cro. El. 43.*That his wife shall pay all, and take all. *Cro. El. 43.*So, if he name *A.* his executor, and afterwards devise goods to *A.* and *B.* to dispose of for his soul; both are his executors. *Bro. Exr. 98.*So, if he name *A.* his executor and that *B.* shall administer with him, or in aid of him. *Off. Exr. 13. Dy. 4. a. in marg.*But if *B.* be made overseer to the executor, or a co-adjutor, without more, he is not a co-executor. *Off. Exr. 13.*

A tel.

A testator may name one, or more his executors.

Or, one for goods in one country, or kingdom, and another for goods in another country. *Off. Exr. 17. Dy. 4. a.*

Or, one for part of his goods, another for such a part. *Off. Exr. 17.*

So he may name such an one for his executor, for such a time, and afterwards another. *Ibid.*

Or, such an one to be his executor upon such a condition, or contingency. *Off. Exr. 15. Mo. 12. R. 3 Leo. 3.*

Or, that upon such a condition to be performed *A.* shall be executor, otherwise *B.* *Off. Exr. 16. 1 Rol. 889. l. 5. 1 Leo. 229.*

But where the condition is subsequent, *A.* shall be executor, till a breach. *Off. Exr. 16. Dy. 4. a. in marg. Vide 1 Leo. 229.*

And where the condition is repugnant, as, that one of the executors shall not administer, it will be void. *Off. Exr. 19, 20. R. Dy. 4. a.*

Who may make an executor, and who not. *Vide Devise, (G.—H. 1, &c.)*

(B. 2.) Who may be an Executor.

A testator may name every one, that he pleases, to be his executor. (B. 2.)
A common person.

Tho' he be a villein. *Vide Co. Lit. 124. a. Off. Exr. 23.*

An infant, or in *ventre sa mere.* *Vide Off. Exr. 307.*

A feme-covert. *Vide Off. Exr. 281, 291.*

An alien. *Off. Exr. 22. Cro. Car. 9.*

So, a man outlawed. *Ibid.*

Or, convicted, or attainted. *Ibid.*

So, a monk, fryar, &c. tho' dead persons. *Off. Exr. 22, 3.*

So, if an executor become a bankrupt, the probate by him shall not be revoked. *R. Skin. 299.*

But a corporation aggregate cannot be an executor; for it cannot take an oath to make probate of the will. *Semb. Off. Exr. 25.*

So the king may be an executor. *4 Inst. 335.*

But the king shall appoint commissioners to administer for him, who shall sue, and be sued. *Ibid.* (B. 3.)
The king.

(B. 4.) When an Executor may refuse.

But an executor may refuse before ordinary, to be executor, and his refusal shall be recorded by him. *Off. Exr. 54.*

And if the bishop himself be made executor, he may refuse before his commissary. *Ibid.*

And if the executor send a letter, &c. to the ordinary, by which he renounces, and the refusal be recorded, it is sufficient. *Off. Exr. 54. R. Cro. El. 92. 1 Leo. 135.*

So

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So if a debtee, being named executor, sue the ordinary for the debt that amounts to a refusal. *Off. Exr.* 54. (a)

So, if an executor plead, never executor, nor ever administered as executor. 9 Co. 36. b.

But after administration, an executor cannot refuse. b *Ed.* 4. 47. *Pl. Com.* 280. b. *R.* 9 Co. 37. b.

So, after an oath taken before a surrogate, he cannot refuse, tho' a caveat be entered. *R.* 1 *Vent.* 335.

And if administration be granted upon a refusal, after he has administered, it may be repealed. *Vide Administrator*, (B. 1, 8.)

And if the executor refuse, and administration be granted, he cannot afterwards prove the will. *R.* 50 *Ed.* 3. 9. *D.* 36 *H.* 6. 8. a. *R. Cro. El.* 92. *R.* 9 Co. 37. a.

So, he cannot accept the executorship, and afterwards refuse a term for years, &c. *R. Lat.* 260, 261. *R.* 1 *Sid.* 266. *Pol.* 127. *Vide post*, (B. 10.)

Yet, if an executor does not refuse, but only makes default upon a citation to prove the will, and upon that administration is granted, he may afterwards prove the will. 7 *Ed.* 4. 13. a. 10 *H.* 7. 18. b. *Vide* 9 Co. 37. b.

So, if one executor appears and proves the will, although the other refuses, he may afterwards prove the will; for he continues executor, notwithstanding his refusal. 9 Co. 37. 1 *Sal.* 307. *Adm. Bend.* 15. 1 *And.* 27.

[If there are two executors and one renounces, yet he may still come in whenever he pleases, and demand probate; but if both renounce, and administration is granted, it is otherwise. *Robinson v. Pet.* P. 1734. 3 *P. W.* 249. *Rex v. Simpson*, H. 4 G. 3. 3 *B. M.* 1463.]

And may release a debt, and shall be joined in a suit, &c. 5 Co. 28. a. *Vide* 9 Co. 37. *Vide Pleader*, (2 D. 1, 2.)

(B. 5.) When his debt shall be released.

When an executor is indebted to the testator, his debt shall be released; for the executor cannot maintain an action against himself. *Off. Exr.* 44. 1 *Sal.* 305. *Vide Release*, (A. 2.) **Vide the notes to Co. Lit.* 264. b.—*Hargrave and Butler's edition.* (b)

And therefore, if the executor was indebted upon bond, or otherwise, to the testator, the debt shall be released. *R.* 8 Co. 136. a. 1 *Rol.* 934. l. 47. *Cro. Car.* 373. *Adm.* 1 *Sal.* 300.

So, if the testator make one debtor his executor, where several are jointly bound or indebted to him, it shall be a release to all. *D. Cro. Car.* 372, 551. 1 *Sal.* 300.

So, if he make the wife of one obligor, or debtor his executrix. *R. Hob.* 10. *R. Mo.* 855.

(a) The reason of this seems to be, that where there is no executor, and before administration granted, the ordinary has the custody of the goods of the deceased; but where a man is appointed executor, he comes in place of the ordinary, and may retain his own debt, there being nobody whom he can sue after he has accepted the office of executor; but by suing the ordinary, before he has acted as executor, he shews that he considers the deceased as having died without appointing an executor, and therefore such act may reasonably be taken as a renunciation of the office.

(b) *Vide note* (b) in the next page.

Tho' the testator was within age. *Co. Lit.* 264. b.

Tho' the executor does not prove the will, nor administer.

R. 1 *Sal.* 300.

So, if he make his debtor and others his executors, the debt is released; for they must all join in a suit. *Off. Exr.* 44. *Vide* 1 *Sal.* 300.

[If a man devises all his real and personal estate not before devised to his two executors, as tenants in common, and one of them is indebted by bond to testator; this debt (notwithstanding the strongest parol evidence to the contrary) is not released, and he shall account with the other executor and residuary legatee for the money. *Brown v. Selwin*, *M.* 8 G. 2. C. T. T. 240.]

And if the executor, who was indebted to the testator, dies, an action does not lie against his executor or administrator for the debt; for a personal thing suspended is extinct. *Off. Exr.* 45.

Nor against the surviving executor, where there was another executor. *R.* 1. *Sal.* 308.

Tho' he dies before he administers. *Off. Exr.* 45.

Or, does not join in the probate of the will. 1 *Sal.* 308.

If the obligor make the obligee executor, who agrees; the debt shall not be discharged, but he may retain assets to the value. *Jon.* 345.

If the testator make his creditor his executor, the action shall be released, but the debt remains, for which he may retain. *R. per* 7 *Just. Pl. Com.* 186. *Co. Lit.* 264. b. *Vide post*, (C. 1, 2.)

But if the debtor be executor, tho' the action be released, the debt shall be assets in his hands for satisfaction of other creditors and legatees. *Pl. Com.* 186. a. *R. Yel.* 160. *Per three J. Cro. Car.* 373. *Vide Assets*, (C.)

If A. and B. are bound to D. and A. makes D. and F. executors, and D. refuses, the debt is not released. *R. Jon.* 345. *Vide* 1 *Rol.* 934. l. 38.

So, if a man make the executor of one obligor or debtor his executor, it is no release of the action, for the other obligor or debtor may be sued by such executor, if he has not assets of the other obligor in his hands. *R. Cro. Car.* 372. 1 *Rol.* 934. l. 27. *Hutt.* 128. *Jon.* 345. 1 *Sal.* 305.

So, if a woman executrix take to husband the debtor of her testator, the debt is not released, but the action suspended only during the coverture. *Co. Lit.* 264. b. 8 *Co.* 136. a. *Cro. El.* 114. 1 *Rol.* 934. l. 52. 1 *Sal.* 306. 326. *R.* 1 *Leo.* 320.

So, if the ordinary commit administration to the debtor of an intestate, it is no release of the debt. *R.* 8 *Co.* 136. a. 1 *Rol.* 934. l. 42. *R.* 1 *Sid.* 79. *Adm.* 1 *Sal.* 306. (a)

(b) The reason given in the first of these cases is equally applicable to the second, and therefore seems not to be the true reason; the true reason is, that in the first case the executor being appointed by the testator, he shall be taken, if nothing to the contrary appear on the face of the will, to have intended a release of the debt, as a recompence for his trouble; but the administrator not being appointed by the deceased, but by the ordinary, no such intention can be presumed.

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Z

So,

So, if the executor of one obligor make the obligee his executor, he may sue the other obligor, if he is not satisfied by the assets of the obligor who died. *R. 2 Lev. 73.*

So, if the obligor make the obligee his executor, and there are not assets, he may sue the heir. *1 Sal. 304.*

So, if the obligee make the obligor his executor, and he refuses before the ordinary, it shall not be a release. *1 Sal. 301, 307.*

(B. 6.) The Duty of an Executor.

(B. 6.)
He must
make pro-
bate of the
will. By
whom the
probate
shall be,

*There were wills before there was any ecclesiastical jurisdiction; and consequently the cognizance thereof, belonging then solely to the civil magistrate. *Burn's Eccl. Law, Title, Wills, Probate.**

*And the better opinion seems to be, that the probate of testaments belonged to the county court, or to the court baron of the respective lord of the manor where the testator died. *Id. Ib.**

The probate of wills does not belong to the spiritual court by the civil, or canon law. *Seld. Orig. of Eccl. Jurisd. of Testaments, cap. 1, 2. Eq. Ca. 207.*

Nor originally by the common law. *Per all the J. 11 H. 7. 12. b. 5 Co. de Jure Ecclesiastico, 16. b. 9 Co. 37. b. Per two J. the others cont. 1 Sid. 46, 371.*

But it was established to the spiritual court before the time of *Hen. 2. Seld. Or. of Eccl. Jur. of Testaments, cap. 5, 6.*

And now belongs to it only for things personal. *Cro. Car. 395. Eq. Ca. 207, 8.*

Yet, by the custom of some manors, probate of wills belongs to the lord. *9 Co. 37. b. Off. Exr. 62. Adm. 2 Inst. 231. Eq. Ca. 207.*

And this, in a will of goods, as well as of lands. *Off. Exr. 62.*

If the testator had *bona notabilia*, the probate belongs to the archbishop of the province. *Vide Off. Exr. 64. Vide Administrator, (B. 3.)*

So the probate of the will of a bishop belongs to the archbishop of the province, tho' he had no goods out of his diocese. *4 Inst. 335.*

If the testator had not *bona notabilia*, it belongs to the bishop of the diocese generally. *Vide Administrator, (B. 5.)*

Or, if he die within a peculiar, to the judge of the peculiar.

What are *bona notabilia*, *Vide Administrator, (B. 4.)*

If the probate be by a bishop, or other inferior judge, when it does not belong to him, it is void. *R. 5 Co. 30. a. Vide Administrator, (B. 5.)*

But if it be by the metropolitan, when it does not belong to him, it is only voidable. *R. 5 Co. 30. a. Vide Administrator, (B. 3.)*

[And it must be avoided before probate can be granted by the bishop. *Rex v. Loggan, H. 4 G. Str. 73.*]

The ordinary cannot insist upon security from the executor before the grant of the probate. *1 Sal. 299. *1 Lord Raym. 363.*

Or,

Or, refuse to grant probate to the executor, *quia incapax*, by the canon law. *R. 1 Sal. 299. Sho. 293.*

And if he refuse the probate to him, who ought to have it, a *mandamus* lies against him. *1 Sal. 299. Vide Mandamus, (A.)*

[If he refuses to grant a probate pending a commission of appraisement; a peremptory *mandamus* shall issue. *Rex v. Bettefworth, H. 3 G. 2. Str. 857.*]

So by the *St. 21 H. 8. 5.* The executor, or administrator, (B. 7.) calling two creditors, or legatees, or otherwise two other honest persons, in their presence and by their discretions shall make a true and perfect inventory of all the deceased's goods and chattels, &c. and one part thereof on oath deliver to the ordinary, and the other keep himself. Exhibit an inventory.

The ordinary shall not refuse the inventory tendered.

[He cannot falsify an inventory at the suit of a creditor; and if he does, prohibition shall go after sentence. *Catchside v. Ovington, T. 6 G. 3. 3 B. M. 1922.*]

And may convene the executor to make or refuse probate, and bring in an inventory, &c. *5 Mod. 247. cont.*

And shall deliver a copy of the testament, or inventory, to any requesting the same, taking no more for search and copy than is due to the scribe for registering the same, or *1d.* for every ten lines ten inches in length, at his election.

But the inventory contains only goods, chattels, wares and merchandizes, and not things in action, &c. *Ray. 471.*

Nor, by the *St. 21 H. 8. 5.* Money by the sale of lands devised to be sold.

So the ordinary may respite, or dispense with the inventory, if the debts and legacies are paid. *Ray. 471.*

Tho' a legatee sues for it, who will not accept his legacy, when it is tendered. *R. Ray. 471.*

By the *St. 21 H. 8. 5.* The ordinary shall take for probate of the testament, registering, and inventory *6d.* only for the scribe, when the goods of the deceased exceed not *5l.*; when they exceed not *40l. 3s. 6d.* only, viz. *2s. 6d.* for the ordinary, and *12d.* for the scribe; and when they exceed *40l.* but *5s.* Half to the ordinary, and half to the scribe, or instead thereof *1d.* for every ten lines ten inches in length, at his election; and like rates for granting administration, &c. on pain of *10l.* to the king and party grieved for every offence, and so much to the party grieved, as he takes contrary to the act; so as the testament be exhibited in writing with wax affixed ready to be sealed. (B. 8.) Charge of probate or inventory.

And if he takes more, it will be extortion. *Vide Extortion, (A. 2.) Vide Off. Exr. 188.*

Tho' the probate be not annexed to the testament itself, but to a transcript of it, he shall take nothing for ingrossing the transcript. *R. 4 Inst. 336. 3 Inst. 149.*

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And if the testament be written in paper, and transcribed in parchment, and brought to the ordinary, he may register and fix the seal to the one or the other; but he shall take only 5s. for the whole. *3 Inst.* 149.

So he shall take nothing for the examination of the transcript with the original, but what is agreed. *3 Inst.* 150.

(B. 9.) What things he may do before Probate.

But the property of the goods is vested in the executor before probate. *Pl. Com.* 280.

And he may administer them. *Pl. Com.* 280. *b.* *R. 2 And.* 150, 1.

Or give and alienate them. *Pl. Com.* 280. *b.* *Off. Exr.* 49.

So he may release a debt before probate. *Pl. Com.* 281. *a.* *9 Co.* 38. *a.* 39. *a.* *Co. Lit.* 292. *b.*

*So he may demise lands devised in the testator's will, before probate. *2 Bl. Rep.* 694.*

Pay, and receive debts. *Off. Exr.* 49. *Hut.* 31.

So a release to an executor before probate is good, if he afterwards prove the will. *R. 1 Rol.* 917. *l. 2.*

So he may assent to a legacy. *Off. Exr.* 49.

So if *A.* take administration, and take goods out of the possession of the executor, trespass lies against him; for the administration is void. *R. 2 And.* 150.

So he may commence an action before probate, tho' he shall not declare. *1 Sal.* 302, 303.

Or, avow for rent, incident to a reversion for years, which he has as executor. *1 Sal.* 302, 307.

So he may be sued before probate. *Pl. Com.* 280. *b.* *Hut.* 31.

So after probate an executor may have trespass against him, who takes goods after the death of his testator by an administration granted to him. *R. 2 Bul.* 268.

But an executor cannot maintain an action before probate. *Pl. Com.* 280. *b.* *9 Co.* 38. *a.* **1 Lord Raym.* 364.*

Yet trespass, *trover*, &c. for goods taken out of his own possession he may maintain before probate; for there a proof of letters testamentary is not necessary. *Off. Exr.* 50.

So, debt, for goods of the testator sold by himself. *Off. Exr.* 51.

So, if *A.* be executor for so many years, and afterwards *B.* be named executor, and *A.* prove the will; after his time expired, *B.* may sue, without any other probate. *Ca. Ch.* 265.

So, if an executor commence an action before probate and afterwards prove the will, it shall be good by relation between the parties. *R. 3 Lew.* 58. *1 Vent.* 370. *Skin.* 23. *R. 1 Rol.* 917. *l. 10.* for it is sufficient, if the probate appears upon the declaration.

[If an executor before probate files a bill, his subsequent proving the will makes the bill good. *Humphreys v. Humphreys*, *H.* 1734. *3 P. W.* 349. *Q.* Must it not be before answer?] Yet

An executor,

Yet an arrest before probate is not good as to a stranger, tho' he afterwards prove the will. *R. 3 Lev. 58. 1 Vent. 370. Skin. 22, 3.*

So an administrator cannot commence an action before administration granted. *1 Sal. 303.*

(B. 10.) What Interest an Executor, or Administrator, has in the Goods of the Deceased.

An executor, or administrator, has the property of the goods of his testator, or intestate, vested in him before his actual possession.

And therefore may have *trover*, trespass, &c. against him who takes them before he has actual possession of them. *R. Cro. El. 377. Vide post, (B. 13.) Vide action upon the case upon trover, (B.)*

And tho' he do not prove the will for a long time after the death of the testator, yet the property shall be adjudged in him immediately upon his death. *2 Rol. 554. l. 10.*

So, tho' administration be not granted for a long time, yet when it is granted, it vests the property in the administrator, by relation, from the time of the death of the intestate. *Per G. B. Mich. 9 Ann. R. 2 Rol. 554. l. 15, 25.*

If the testator had a term for years, this vests in the executor, or administrator; and he cannot refuse it, though it is worth nothing. *R. Lat. 260, 261. R. 1 Sid. 266. R. Tel. 103. Pol. 127. Adm. 1 Sal. 297. 1 Lev. 127. 1 Vent. 271. Vide ante (B. 4.)*

So, if *A.* consent to a disposition of the intestate's goods, and afterwards take administration, he shall be bound by the gift before. *Per two J. Holt cont. 1 Sal. 295, 6. 3 Mod. 276.*

But an executor, or administrator cannot devise the goods of the testator or intestate.

Nor shall they be taken in execution for the proper debt of the executor, or administrator.

If an executor, or administrator pay debts with his own goods, it will be an administration for so much of the goods of the testator, &c. and he shall have them afterwards in his own right. *R. Kel. 62, 63.*

If he give goods to *A.* in satisfaction of the expence at the funeral, and afterwards take administration, he cannot have *trover* against *A.* for the goods. *R. 3 Mod. 276.*

If he assign to *A.* a bond due from *B.* to the testator in satisfaction, the administrator *de bonis non*, &c. shall not afterwards sue *B.* *Skin. 143.*

Or, assign a recognizance before an extent, to *A.* who pays the money due. *R. Skin. 143.*

(B. 11.) How they represent the Testator, or Intestate.

An executor, or administrator, represents the person of his testator, or intestate. *Co. Lit. 209. a. Vide in Chancery, (3 G. 1.)*
And

And therefore, if money be payable to *B.* without naming his executor, yet his executor, or administrator, shall have an action for it.

So, if money be payable to *A.* or his assigns, his executor shall take it; for he is assignee in law. *Hob. 9.*

So, if a man, reciting that he has 1000*l.* of *B.*'s money, covenants, that so long as he has the money in his hands he will pay 100*l.* annually to *B.* his executor shall have an action for it; for it appears, that it was intended for the interest of the 1000*l.* which the executor shall have. *R. 1 Rol. 913. l. 15.*

If money is awarded to *B.* and that he shall release; the executor of *B.* shall have the money, and make the release, tho' his testator died before the day of payment. *R. 2 Vent. 249. R. 1 Leo. 316.*

So, if *A.* be bound by bond to perform an award, and it be awarded, that *A.* shall pay 20*l.* at *Michaelmas* to *B.* and before *Michaelmas* *A.* dies, his executor shall pay it; for it was a duty vested in *B.* *Ray. 416. Cro. El. 10.*

So, if *A.* be bound by bond to pay 60*l.* to *B.* if he does not prove, before the 10th of *November* next, that it was paid; and *A.* dies before the 10th of *November*. *R. Ray. 415.*

But if an annuity be given to *B.* during the life of the testator's wife, upon condition that he be civil to his wife, and *B.* dies before the wife, his executor shall not have it; for it was personal to *B.* *Pr. Ch. 173.*

(B. 12.) If there are several Executors, or Administrators, their Interest is intire,

If there are several executors, or administrators, they have a joint and intire interest in all the goods of the testator, which cannot be divided.

And therefore, if one dispose of all the goods without the others, it will be good for all. *Dy. 23. b. in marg.*

Tho' it be a chattel real; as a term for years. *R. Dy. 23. b.*

So a surrender of a term by one is good for all. *Dy. 23. b. in marg.*

A release of a debt by one is good for all. *Ibid.*

[One administrator cannot release a debt, or convey an interest, so as to bind another, tho' one executor can. *Hudson v. Hudson, M. 1737. 1 Atkyns 460.*]

An attornment by one is good for all. *Dy. 23. b. in marg.*

If one confess a judgment, the judgment shall be against all. *Ibid.*

[But one of three executors gave warrant of attorney to confess a judgment against himself and co-executors; judgment entered against all the executors *de bonis testatoris*, for the debt was held ill, and set aside on motion, for executors may plead different pleas. *Elwell v. Quash, M. 3 G. Str. 20.*]

So one cannot demand an account of the profits of the estate against the others. 1 *Rel.* 117. l. 35. *Vide Account*, (D.) *Dy.* 23. *b. in marg.*

So one cannot demand a partition of the goods, against the others. *Dy.* 23. *b. in marg.* 27 *H.* 8. 22. *a.*

So, if one give a bond to a stranger, for his own debt, *detinue* does not lie by the other surviving executor against the stranger for this bond; tho' it was only a *chose in action*. *R.* *Dy.* 23. *b. in marg.*

So, if he deliver a bond of the testator to a stranger; tho' the debt is not lost thereby. *Dy.* 23. *b. in marg.*

So, if he pay his own money for a debt of the testator, and die; the survivor shall not have an action against his executor for goods of the first testator, which do not exceed the value of the debt paid with his own money. *Ibid.*

So one cannot give so much of the goods to the other. *R.* 27 *H.* 8. 22. *a.*

[*B.* *R.* may make a rule by consent that probate shall be granted to two executors, *A.* and *B.* but that *A.* shall not intermeddle, and that *B.* shall indemnify him. *Rex v. Simpson*, *H.* 4 *G.* 3. 3 *B. M.* 1463.]

[If two tenants in common put out money as joint executors, it shall not survive, but go to their respective representatives. *Partridge v. Parolet*, *H.* 1737. 1 *Atkyns* 467.]

[The power of executors is not determined by the death of one, but survives to the other; therefore if a legacy is left to *A.* payable as two executors think fit, (and if *A.* dies without issue to revert) and one executor dies, the survivor may direct the whole to be paid to *A.* *Flanders v. Clarke*, *P.* 1747. 3 *Atkyns* 509. 1 *Vesey* 9.]

[If there is judgment against *A.* partner, and one of the executors of *B.* for a partnership debt, *A.* may give a mortgage of separate estate of *B.* the testator, as a further security, and equity will order satisfaction out of the mortgage, without sending them to law. *Jacomb v. Harwood*, *P.* 1751. 2 *Vesey* 265.]

(B. 13.) What Actions an Executor, or Administrator, shall have.

An executor, or administrator, may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his testator, or intestate.

So he may have covenant, upon a covenant made to his testator for a personal thing. *Lat.* 168.

Or, upon a covenant that touches the realty, if it be broken in the life of the testator. *Vide Covenant*, (B. 1.)

So, upon any contract made to the testator. *Mar. pl.* 23.

Tho' the contract, or promise to the testator be for the benefit of a stranger. *Al.* 1.

Tho' the obligation, &c. was for performance of an award. *R.* 2 *Vent.* 249.

Tho' it be upon a simple contract. *D. cont.* 2 *Cro.* 271.

So

So an executor or administrator shall have *replevin* for goods taken in the life of the testator. *Off. Exr.* 94. 1 *Sid.* 82.

So he shall have a writ of error, attain, or deceit. *Vide Lat.* 167.

An *audita querela*.

An action for a relief due to the testator. *R. Noy.* 43.

But by the common law, an executor, or administrator, had not an action for a wrong done to the testator in his life; as, for a trespass in taking his goods, &c. *Vide* *ft.* 4 *Ed.* 3. 7.

So he had not an action founded upon a matter in the privity of the testator; as, account. *Co. Lit.* 89. *b.* 2 *Inst.* 404.

Yet now, by the *ft.* 4 *Ed.* 3. 7. an executor shall have an action for a trespass to the testator in his life-time.

So, by the *ft.* 13 *Ed.* 1. *W.* 2. 23. an executor shall have an action of account upon, an account with his testator.

By the *ft.* 25 *Ed.* 3. 5. the executor of an executor shall have an action of debt, account, trespass, &c. as well as the testator. *Vide post*, (G.)

And, by the *ft.* 31 *Ed.* 3. 11. administrators may have the same actions to demand, or recover, as executors.

And therefore now, an executor, or administrator shall have trespass, or *trover*, for the goods of the testator taken in his life-time. *Off. Exr.* 98. *Mo.* 400. *R. Cro. El.* 377. *Lat.* 168.

1 *And.* 242. 1 *Leo.* 193, 4.

So, for a trespass with cattle in his close. *Semb. Off. Exr.* 98.

So, an ejectment for ejecting the testator. *Sav.* 118, *Lat.* 168. *R.* 1 *And.* 242. *Poph.* 189. 7 *H.* 4. 6. *b.*

So, trespass *quare blada crescentia* upon the land of the testator *asportavit*. *R.* 1 *Vent.* 187.

So, by the equity of this statute an executor, or administrator shall have every action for a wrong done to the personal estate of his testator. *Semb. Lat.* 168.

So he shall have ravishment of ward. *D.* 1 *Sid.* 82. 1 *Rob.* 912. *l.* 40. *Poph.* 190.

Debt upon the *ft.* 1 *Ed.* 6. 13. for not setting out tithes. 1 *Sid.* 88, 407. 4 *Mod.* 404. 1 *Sal.* 314. 1 *Vent.* 30.

Debt upon a judgment against an executor, or administrator, upon a suggestion of a *devastavit*. *R.* 1 *Sal.* 314. *Mod. Ca.* 126.

So he shall have a *quare impedit*, for a disturbance in the life-time of the testator. *Off. Exr.* 95. *D.* 1 *Sid.* 82. *R. Sav.* 94, 118. *Lat.* 168. *R.* 4 *Leo.* 15. 1 *And.* 242. *Noy* 87. *Poph.* 189. *Ow.* 99.

So he shall have an action upon the case against the sheriff, for an escape of one taken for debt. *Dub.* 1 *Rob.* 912. *l.* 45. *Cro. Car.* 297. *D.* 4 *Mod.* 404. *Dub. Lat.* 168. *R.* if the escape was after judgment. *Dy.* 322. *a. in marg.* *Noy* 87. *Poph.* 189. 191. *Dub. Fon.* 173. *Vide infra.* **Ld. Raym.* 973.*

Or, for not returning his writ, and paying money levied upon a *feri facias*. 1 *Rob.* 913. *l.* 5. *Cro. Car.* 297.

Or, for a false return, that he had not levied the debt. *R.* 4 *Mod.* 404. 1 *Sal.* 12. *Comb.* 322, 3. *1 *Ld. Raym.* 40.*

So,

So, for an escape, tho' it was in the life-time of his testator. *Mod. Ca.* 126. *Vide supra.*

[Or for removing goods taken in execution before the intestate (the landlord) was paid a year's rent. *Palgrave v. Windham*, *M.* 6 G. *Str.* 212.]

So an executor shall sue, for an escape of one in execution upon a judgment by him as administrator. *R. Godb.* 262. *Vide 1 Rol.* 276.

[So executor of assignee of a bail-bond shall have action; it is an interest vested. *Nott v. Stephens*, *H.* 3 G. 2. *Fort.* 367.]

But since these statutes an executor, or administrator, cannot have an action for a wrong to the person of his testator: as, for a battery, imprisonment, &c. *Lat.* 168. 169. *1 And.* 243. *Jon.* 174.

Nor, for a prejudice to the freehold of the testator; as, trespass *quare herbam secuit et asportavit*; for the grass is parcel of the freehold. *1 Vent.* 187. *Jon.* 174.

As to the pleading in an action by an executor, or administrator. *Vide Pleader*, (2 D. 1, &c.)

(B. 14.) What Actions will lie against them.

An action lies against an executor, or administrator, upon every contract, debt, or covenant made by his testator, or intestate, which appears by any record, or specialty.

Tho' it be a specialty of an inferior nature: as, fines, issues, &c. at assises, quarter-sessions, by commission of sewers, or bankrupts, or at the lect, &c. *Off. Exr.* 169.

So debt lies against the executors of a sheriff, upon a judgment in an action against the sheriff for an escape. *Dy.* 322.

*But if no action was brought against the sheriff in his life-time, his executor is not chargeable. *Semb. Ld. Raym.* 973. *Sed quare.**

So, upon any debt, or contract without specialty, where the testator could not have waged his law: as, in debt for rent upon a parole lease. *Vide for this, Pleader*, (2 W. 45.)

So debt lies against an executor by a gaoler, for the meat and drink of the testator in prison; for there he could not wage his law. *9 Co.* 87. *b.*

So, upon an obligation, or covenant, to instruct an apprentice in his trade; though it sounds as a personal act. *R. 1 Lev.* 177.

So, upon a debt, covenant, contract, &c. which commences by consent of the parties; tho' it sound in *tort*, and damage. *Dy.* 14. *a. in marg.*

So, for rent upon a covenant in law. *R. Sti.* 387, 406.

[So in the *debet et detinet* as assignee of a term, for rent incurred in his own time, and will be chargeable *de bonis propriis*. *Lydall v. Dunlapp*, *H.* 16 G. 2. *Wilf.* 4.]

Action upon the case upon an *assumpsit* in law. *R. 9 Co.* 89. *b.* *2 Cro.* 294. *Pl. Com.* 182. *10 Co.* 77. *a.* *R. 1 Rol.* 14. *l.* 5.

*So

*So assumpsit lies by a legatee for a legacy on a special promise of the executor in consideration of having assets sufficient to discharge debts and legacies. *Cowp.* 284, 289.*

So, upon a special, or collateral promise of the testator. *R. 1 Rol.* 14. *b.* 2 *Cro.* 404. 3 *Bul.* 2. 6. *R. Sti.* 158. *R. acc.* but the judgment was reversed, *Ow.* 56, 7. *R. in B. R. and affirmed in error by six justices and barons, Tanfield cont. Pal.* 329. *Jon.* 16.

So it lies against an executor or administrator, of one who takes the fifths due to ministers by the *ft.* 12 *Car.* 2. 17. *R. 1 Sid.* 88. *Ray.* 57.

Or, of a sheriff, who has levied money upon a *feri facias*, and not paid it. *R. 1 Rol.* 921. *l.* 25. *Jon.* 430. *R. Mar.* 13.

Or, of a common carrier for goods lost by him. 5 *Mod.* 92.

Or, of an intruder upon the king, who cuts trees, &c. of value. *R. Sav.* 40.

Or, for a relief due by his testator to the lord of the manor. *R. Noy.* 43, 4.

So an attaint lies against an executor, tho' the statute speaks only of an attaint between the parties, and says nothing of the heirs, or executors. *R. 1 And.* 24, 5.

*If judgment be obtained against an administrator *durante*, &c. and afterwards the executor or administrator comes of age, a *scire facias* lies against him on such judgment. 1 *Ld. Raym.* 265.*

(B. 15.) What not.

But an action does not lie against an executor, or administrator, where the testator might have waged his law: as, in debt upon a simple contract. 9 *Co.* 87. *b.* *R. Cro. El.* 600. *R. 2 H.* 4. 14. *b.* [*Vide* where one may wage his law, in *Pleader*, (2 *W.* 45.)]

Nor, debt upon a *concessit solvere* by custom in an inferior court; for he will be ousted of his law by such means. *Sti.* 199. 228.

*Neither is an executor liable to be sued in the court of conscience, tho' he may sue there as plaintiff. *Douglas* 263, 264, 246.*

Nor, debt upon a submission by *parol*, and an arbitrament in the life-time of the testator. *R. Cro. El.* 557.

And if there be debt upon a simple contract, it will be error; tho' the defendant plead, or suffer judgment by *nil dicit*. *R. 1 Leo.* 165. *R. 1 And.* 182, 3.

Nor, for a personal wrong by the testator, or intestate: as, trespass does not lie against an executor, or administrator, for a trespass done by the testator, or intestate, to the lands, or goods of another. *Off. Exr.* 182.

Or, to his person by battery, &c.

Nor, does it lie against the executor of a gaoler, &c. for an escape. 41 *Aff. pl.* 15. *R. Dy.* 322. 1 *Rol.* 921. *l.* 20. *D. 1 Sand.* 218. 2 *Inf.* 382.

Nor,

Nor, debt upon the *ft. 2 Ed. 6. 13.* for not setting out tithes, against an executor. *1 Sid. 88, 181, 407.*

So waste does not lie against an executor, or administrator. *Off. Exr. 113.*

Nor, an action upon a penal statute. *Ibid.*

So debt does not lie against an executor upon a suggestion of a *devastavit* by his testator. *R. 2 Lev. 110. Acc. per Holt. Mod. Ca. 126. Sal. 314. cont.* if the testator was executor *de son tort.* *Per Turner, Ch. B. 2 Lev. 133.*

So *trover* does not lie against an executor, upon a *trover* and conversion by his testator. *Per Jones Pal. 330. *Cowp. 371.**

*But another form of action will lie for such cause, as an action for money had and received. *Cowp. 371.* The true distinction is between such actions as lie on account of the *cause* of action, and those which survive or die on account of the *form*. With respect to the *cause*; if the injury be such that the offender acquires no gain to himself at the expence of the sufferer, as, beating or imprisoning a man, there the action does not survive: but where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. With respect to the *form*, no action survives where the plea of the defendant must be not guilty, but where the cause survives some other form must be pursued. *Cowp. 376.**

If costs and damages were given in the star-chamber against one for a riot, they could not be levied upon his executor, or administrator. *R. 2 Cro. 219.*

[If a man does work in expectation of a legacy, he cannot sue the executor. *Osborn v. Guy's Hospital, M. 13 G. Str. 728.*]

As to the pleading in an action against an executor or administrator. *Vide Pleader, (2 D. 2, &c. 11, &c.—3 L. 12.)*

(C) The Manner of the Administration.

(C. 1.) By Payment of Debts,

THE office of an executor, or administrator, consists principally in the care of the funeral, in the probate of the will, in the payment of debts, and the payment of or assent to legacies. *Off. Exr. 186.*

Nothing shall be allowed to an executor, or administrator, for funerals, but the necessary fees and expence.

Yet, if there are assets sufficient, the allowance shall be according to the quality and degree.

So, for the probate nothing shall be expended, but the fees allowed by the *ft. 21 H. 8. 5.* *Vide Off. Exr. 188. Vide ante, (B. 8.)*

So nothing shall be allowed, if he compounds a debt, but that which he actually pays. *27 H. 8. 6. a.*

So, if he pay a less sum upon a judgment, obligation forfeited, &c. *Vide 1 Sand. 336.*

All the debts of the testator, or intestate, ought to be paid. Tho' they are upon simple contract.

So, if the executor, or administrator, pay a debt of his testator, or intestate, with his own money, it will be an administration for so much. *Dy. 2. a. Mo. 2. R. Kel. 63. 1 And. 24. Bend. 11.*

So, if he retain to satisfy a debt to himself. *Vide 1 Leo. 112.*

[The court will not allow an executor or trustee any thing for his time and trouble, especially if there is a legacy given him, even tho' it appears he deserved more. *Robinson v. Pett, P. 1734. 3 P. W. 249.*]

So, if one obligor make the executrix of the obligee his executrix, and leave assets, the debt shall be presently satisfied by these assets, and no action lies against the other obligor. *R. Hob. 10.*

So, if the executor, without covin, give a bond for a debt of the testator, and the testator be discharged. *R. 1 Leo. 112.*

[If intestate dies indebted for rent, and the administrator becomes also indebted for rent of the same premises in his own right, and pays a sum in discharge of part of intestate's debt, and then another sum without saying on what account, it shall be presumed it was still in discharge of intestate's debt, and not of his own. *Bowes v. Lucas, M. 11 G. 2. Andr. 55.*]

[Testator dies indebted to plaintiff for coals, his wife (executrix) receives more coals on her own account; marries defendant, who also receives more coals on his own account, and makes several payments on account generally, which were sufficient to discharge the debts from testator, and from the wife whilst sole, and plaintiff sues defendant only. Plaintiff having no directions from defendant, may apply *the money received to discharge the wife's own debt, for which the defendant was liable, but not to the discharge of the demand against her as executrix, the validity of which depends on the question of assets, and the manner of administering them. *Goddard v. Cox, T. 16 G. 2. Str. 1194.**

(C. 2.) The executor, or administrator, ought to pay a debt due to the king before any other. *Off. Exr. 190.*
In what order it shall be.

So, a debt upon bond to the king, tho' it be not upon record, shall be satisfied before any other. *R. 1 And. 129, 130.*

So, a debt forfeited by outlawry. *1 And. 130.*

And, if he be sued for another debt, he may plead the debt to the king, and no assets *ultra*. *Bro. V. M. 474. Off. Exr. 190, 192. Vide 1 And. 129.*

So, if execution be sued against him upon a statute or recognizance, when he is indebted to the king, he may have an *audita querela*. *Off. Exr. 190, 192.*

So outlawry upon a judgment, where the land is seized, shall be satisfied before a judgment prior to the outlawry. *R. 1 Sal. 80.*

But this extends not to a debt of the king, that is not of record: as, upon a contract for tin, &c. *Off. Exr. 191.*

Nor, to a fine for admittance to a copyhold of a manor of the king. *Vide Off. Exr. 191, 2.*

Nor,

Nor, to an amerciament in the court of the king, not to record. *Ibid.*

Nor, to a fee-farm rent, or other rent to the king, not due upon record. *Dub. Off. Exr.* 193.

Nor, to a debt forfeited to the king by outlawry upon mesne process. *1 Sal.* 80.

Or, assigned to the king. *Per Tanfield, Lane* 65.

He who pleads a debt due to the king, must shew the record in certain.

After a debt to the king upon record, the executor, or administrator ought to pay a debt due by judgment.

And this shall be paid, before a debt upon a statute or recognizance of an older date. *R. 4 Co.* 60. *a.* *Vide Cro. El.* 734, 822. *Yel.* 29. *1 Rol.* 926. *l.* 35. 40. *R. 5 Co.* 28. *b.* *R. 1 Leo.* 328.

Tho' the judgment be by confession, after a suit commenced. *R. 1 Sid.* 21. *Adm. 1 Sel.* 80.

Tho' it be in an inferior court of record. *R. Vau.* 94.

Tho' the judgment be obtained for a debt upon simple contract. *5 Co.* 82. *b.* *Cro. El.* 409. *Vau.* 94.

And obtained against the executor, or administrator himself. *5 Co.* 82. *b.* *Adm. cont.* 8 *Co.* 133. *a.* *Dub. 1 Sid.* 230. *Acc. Vau.* 94. *R. acc. 1 Sid.* 333. *F. g.* 77.

Or, against one executor only, when there are several. *Cro. El.* (471) *R. 1 Sid.* 404. *1 Lev.* 261.

Or against an executor, by the name of administrator; or *à contra.* *Cont. Cro. El.* 41. *R. Cro. El.* 646. *Co. Ent.* 149. *a.* *R. 1 Sid.* 404. *1 Lev.* 261.

Tho' a debt upon specialty be sued before the debt upon judgment demanded. *Dy.* 80. *a.*

Tho' the judgment be confessed, after a bill in equity by a bond creditor. *R. 2 Ver.* 299, 300.

Tho' the judgment be entered, after the death of the testator, upon a verdict in his life-time. *R. per three J. Twisd. cont.* *1 Lev.* 278.

[Judgment against an intestate, entered in his life-time, must be preferred. *Robinson v. Tonge, M.* 1735. *3 P. W.* 398.]

[The statute of frauds, which enacts that judgments shall bind lands but from the signing, concerns only purchasers and not creditors, therefore judgments on warrants of attorney entered after intestate's death, are good judgments from the first day of term when intestate was alive. *Ibid.*]

But all judgments are equal, and a latter may be paid before a former. *Off. Exr.* 197.

Tho' debt be brought upon the judgment; for that is not a waiver of the judgment. *R. 1 Sal.* 80.

So a judgment upon a *scire facias* upon a recognizance, &c. *quod executionem habeat*, shall be equal to a judgment *quod recuperet.* *Off. Exr.* 199. *Semb. Yel.* 133.

But a judgment with a defeasance executory, which is not yet broken, shall not be paid before other debts. *Off. Exr.* 197.

So,

So, if he has no notice of a judgment, a statute, or recognizance, may be paid before it. *3 Mod. 115.*

So, if he confesses a judgment upon a simple contract, and afterwards judgment is given against him upon a bond, he cannot pay the second judgment without the first; for he might have pleaded the first, if he had not had assets for both. *R. 3 Lev. 114.*

When all the judgments are equal, to a *scire facias* upon a judgment *quare executio non*, &c. the defendant cannot plead, another judgment of an older or later date, and no assets *ultra*. *Semb. Tel. 133.*

Nor, in debt upon a judgment. *Dub. Tel. 133.*

[Creditors by judgment at law, by decree in equity shall be paid equally by an executor, without preference. *Peploe v. Swinburne, in Sc.' M. 1719. Bunb. 48.*]

After judgment, debts due by statute or recognizance shall be paid before others. *R. 2 Cro. 9. 35. R. Cro. Car. 363.*

So a decree in equity is equal to a judgment. *R. per three Bar. Powel cont. 3 Lev. 355. Per Cowper, Sal. 507. R. 2 Ver. 89.* Next to a judgment; and tho' an executor or administrator cannot plead it, he shall be aided in equity. *1 Ver. 143.*

A statute, or recognizance shall be intended for debt, if the contrary does not appear on the other side. *R. 2 Cro. 9. 35. Dub. 2 Cro. 102.*

And shall be paid before a debt upon specialty; tho' the statute is not yet due. *R. Cro. Car. 363.*

But debts by statute, or recognizance, are in equal degree, and the executor or administrator may satisfy which he will first. *Off. Exr. 201.*

And may pay a later before another of an older date. *Ibid.*

So, if a statute or recognizance be for performance of covenants not broken, he ought to pay debts by specialty before them. *R. 5 Co. 28. b. 1 Rol. 925. l. 27. Mo. 752.*

After judgments, statutes, and recognizances, the executor, or administrator, ought to pay debts upon specialty.

And he ought to pay a debt upon specialty before a debt upon simple contract, tho' the bond is not yet due. *R. 3 Lev. 57.*

And he ought to pay debts upon specialty before a debt upon simple contract, tho' he be not sued for them. *R. 2 Cro. 535.*

Tho' he be first sued for the debt upon simple contract. *Semb. cont. 1 Mod. 175. Cont. per three J. Lev. acc. 3 Lev. 115. Cont. 3 Mod. 115. (a)*

[If two sisters intitled to several sums of money, and to an account of their father's personal estate, agree to let those sums remain with their brother on his giving them a bond for 1000*l.* they shall be creditors for a valuable consideration, tho' the money did not amount to so much. *Blount v. Doughty, P. 1747. 8 Atkyns 481.*]

(a) Note; It seems that payment of a debt on simple contract will support the plea of *plene administravit* to an action on a specialty, if the executor had no notice of the specialty before payment of the debt on simple contract. *Vide the Authorities cited in the last clause.* But a plea of a judgment recovered on a simple contract pleaded to debt on bond, must aver that such recovery was had, before notice of the debt on bond. *1 Term Rep. 690.*

[If *A.* and *B.* are partners, and *A.* gives bond to trustee to pay his wife 1000*l.* at his death, and dies and *B.* administers; this bond has preference as to *A.*'s separate estate, but as to partnership estate, shall come after all partnership creditors. *Croft v. Pyke*, *P.* 1733. 3 *P. W.* 180.]

And after debts by specialty, debts by simple contract.

And he may pay debts by simple contract, before a covenant not broken. *Al.* 38. 2 *Ver.* 101.

But an executor, or administrator may retain to satisfy his own debt before he pays another debt of equal degree.

*And wherever he may be sued or might have paid, he may retain. 3 *Burr.* 1384.*

*And an action of covenant is as much a lien on the assets as an action of debt. *Ibid.**

*And a retainer of a debt may be given in evidence on issue joined on *plene administravit*, or it may be pleaded. *Id. Ibid.* *Black. Rep.* 965.*

[As if *A.* in his life-time has covenanted with *B.* and *C.* to leave by his will (or that his executors, &c. shall pay) 700*l.* to them, in trust, to pay the interest to his wife for life, then to be divided among their children, and for default, as he shall appoint; and binds himself, his heirs, &c. in a penalty for performance, and dies without issue and intestate; *B.* administers, he may retain assets against a bond creditor. *Plumer v. Marchant*, *P.* 3 G. 3. 3 *B. M.* 1380.]

Otherwise, if the debt to the other be of an higher nature. *Off. Exr.* 204.

And an executor *de son tort* cannot retain for his own debt. *Vide Administrator*, (C. 3.)

So an administrator *durante minore etate* may retain for his own debt. *Vide post*, (F.)

And he may retain, if the bond be to another, for money to be paid to him. *Semb. Ray.* 484.

So he may pay amends or satisfaction for a covenant broken, before a bond; for they are in equal degree, and he may pay which he pleases first. *Off. Exr.* 209.

Or, rent due upon a lease for years. *R. H.* 11 *W.* 3. *B. R.* *inter Gage and Acton.* 1 *Sal.* 326. *Carth.* 512. (*Reported Comyns's Reports* 67.) *Vide Off. Exr.* 209.

Tho' it be a lease by *parol.* *R.* 3 *Lev.* 267. 4 *Mod.* 44. 2 *Vent.* 184. *R.* 1 *Ver.* 490.

And tho' the lease be determined. *R.* 3 *Lev.* 267. 4 *Mod.* 44. 2 *Vent.* 184.

So where debts are in equal degree, he may pay the whole to one, tho' he leaves nothing for the other. *Off. Exr.* 205.

Tho' the debt of the other was first demanded. *Dub. Off. Exr.* 206.

Tho' the debt paid was not due at the death of the testator, but became due afterwards. 3 *Lev.* 57.

So, if a suit be commenced by one, he may pay the other, 'till he has notice of the suit. *R.* 2 *Leo.* 60. *Dal.* 39. 2 *H.* 4. 21. b. *R.* 1 *Leo.* 312.

So,

So, if the suit be in equity, he may pay debts of an equal or higher nature, before a decree. *Sal.* 507.

So, if a suit be commenced by one, of which he has notice, he may afterwards confess a judgment to another, and pay him first. *R. 1 Sid.* 21. *Vide supra.*

Tho' the other suit was for a debt upon simple contract. *Vau.* 94. *R. 1 Sid.* 333. *Vide supra.*

Tho' he delayed the first suit by imparlance, dilatory plea, &c. 'till the other had judgment. *Vide Off. Exr.* 206.

And the return of summons, or distress of the sheriff is not notice, if he be not personally summoned. *Dal.* 39.

Nor, an arrest upon a *latitat*, *sub pena* out of the *exchequer*, &c. if it do not express the cause of action.

Yet after notice of a suit, he cannot pay another debt of the same, or an inferior degree, before judgment for it.

And therefore, if he be sued upon a bond he cannot pay another bond, not sued before it. *2 Cro.* 9. for upon *plene administravit* he cannot give in evidence, payment after the action commenced. *R. Dy.* 32. a.

Or, if he has paid since the action before notice, he ought to plead, that he had not notice till such a day, and *plene administravit* before. *Semb. Dy.* 32. a. in marg.

(C. 3.) By Payment of Legacies.

After debts, an executor, or administrator *cum testamento annexo* ought to pay the legacies given by the testator.

And an executor, or administrator, was compellable to account before the ordinary by the common law, tho' he was not bound to swear to or prove his account, when cited *ex officio*, or by a creditor. *1 Sal.* 315, 316.

So, at the suit of a legatee he was compellable to prove his account, if there were no assets upon the account delivered, and he would not pay the legacy. *1 Sal.* 316.

So now, at the suit of a person intitled to distribution; for he is in nature of a legatee. *Ibid.*

So, where an administrator gives a bond according to the *st.* 22 & 23 *Car.* 2. to make account at such a day, and well administer, he must give in his account at the day, without citation, if a court be then held. *R. 1 Sal.* 316.

And such account may be examined at the instance of any, who has an interest in it. *Ibid.*

Yet, otherwise it shall not be examined. *1 Sal.* 316.

Nor shall the creditor have an assignment of the bond to sue for non-payment of a debt to him, or for a *devastavit*, &c. *Ibid.*

But an executor ought not to pay a legacy to him, who cannot take it.

[Payment of legacy into the hands of an infant, is good. *Bilson v. Saunders*, *M.* 1727. *Bunb.* 40.]

Who may devise, and who not, or who may take a legacy, and who not. *Vide in Devise.* (G.—H. 1, &c.—I.—K.)

What

What legacy shall be good, or not. *Vide in Chancery*, (3 Y. 3, &c.)

How a devise of a legacy shall be construed. *Vide in Devise*, (N. 1, &c.) *Vide in Chancery*, (3 A. 3, &c.—3 Y. 7, &c.)

If there are not assets for all the legacies, the legatees must abate in proportion. *Vide in Chancery*, (3 Y. 18, 19.)

And the executor may take security to refund, if debts afterwards appear. *Al.* 38, 39. *Vide in Chancery*, (3 G. 3.)

And therefore, if he pay legacies without security to refund, and a debt afterwards appears, it will be a *devastavit*. *Vide post*, (1.)

Though it be for a covenant broken after the legacy paid. *Dub. Al.* 40. *Sti.* 37, 55, 73. * As to legacies, *vid. Chancery*, 3 G. 7.*

(C. 4.) By performing according to his Power, or Trust.

If the testator gives his executor a power, or authority for any particular purpose, he ought to pursue his power, or authority strictly, according to the intent of the testator.

Vide Chancery, (3 G. 7.)

(C. 5.) By Assent to a Legacy.

If a man devise lands, which he has in fee, to another in fee, (C. 5.) in tail, or for life, the devisee may enter without the assent of the heir, or executor. *Co. Lit.* 111. a. *When necessary.*

And the freehold will be in him before his entry. *Ibid.*

So, if he devise to another for years, the devisee may enter, without assent. *Ibid.*

And if the heir enter before the devisee, he may have an *ex gravi querela*. *Ibid.*

But, if a man devise to another goods or chattels real or personal, the devisee cannot take them, without the assent of the executor. *Co. Lit.* 111. a. 1 *Rol.* 618. l. 36, 40.

Though the goods are at the death of the testator in the hands of the legatee himself. *Off. Ex.* 318.

Though the testator appoint, that he may take them without assent. *Ibid.*

Though the devise be of goods in *specie*. *Al.* 39.

So, if the devise be to the executor himself, he shall take them as executor, 'till his election to have them as legatee. *Pl.* *Com.* 520. *R.* 10 *Co.* 47. b. *R.* 1 *Rol.* 619. l. 25. *Ad.* 50.

Two *J.* 1 *Leo.* 216. *R.* 1 *Lev.* 25. *Dy.* 277. b.

Though all the debts are paid, without the term, or chattel assigned to the executor. *Per And.* 1 *Leo.* 216.

The assent of an executor shall be express, or implied. (C. 6.)

Co. 52. b. *Off. Ex.* 322.

And therefore, if the executor request the legatee to dispose of the legacy, that amounts to an assent. 10 *Co.* 52. b. *What shall be an assent.*

Or, send another to the legatee to purchase it of him.

Off. Ex. 322.

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Or,

Or, offer money to the legatee for the purchase. *Ibid.*

So, if the executor take a grant; lease, &c. from the legatee of the thing, or term devised. *R. 10 Co. 52. b. Off. Ex. 322, 3.*

Or, a grant, &c. in trust for the legatee. *R. 2 Vent. 358.*

So, if the legatee himself be executor, and says he will take according to the will, that amounts to an assent to have it as legatee. *1 Lev. 25.*

Or, reciting that he has a term by devise, grants it over. *R. 1 Rol. 620. l. 5.*

So, if he take the profits to his own use. *1 Rol. 619. l. 52.*

Or, repair the tenements devised at his own charge. *Semb. 1 Leo. 216.*

Or, perform a condition, or trust, &c. annexed to the devise.

Or, exclude a co-executor. *Dy. 277. b.*

So, if a term be devised to the executor for life, and afterwards to another; if he says, that the other will have it after him, it will be an assent to have it as executor. *R. 1 Lev. 25.*

[If term for years is devised to the executor for life, he takes as executor, and not as legatee.]

[Unless there be a special assent thereto, as to a legacy; as by paying a sum charged thereon. *Young v. Holmes, M. 4 G. Str. 70.*]

So an assent to an estate in remainder, is an assent to a present estate.

And an assent to the first estate, is an assent to the devise over. *R. 10 Co. 47. b. 1 Rol. 620. l. 20. 35.*

So an assent to a devise of a chattel lease, is an assent to the devise of a rent out of it. *1 Rol. 620. l. 30.*

Or, to a condition, or contingency annexed. *1 Rol. 620. l. 25.*

So an assent to take part as residuary legatee, is an assent to take the whole residue, as legatee. *R. 2 Rol. 158.*

(C. 7.) But if the executor, being a legatee, enter into the term, but do not prove the will, that does not amount to an assent to have it as legatee. *Vide Off. Exr. 323.*

Or, if he say, that the testator left all to him. *1 Rol. 620. l. 10.*

If an executor, being a legatee, lease, &c. by the name of executor, that amounts to a claim as executor. *R. 1 Leo. 216.*

(C. 8.) If there are several executors, an assent by one is sufficient. *Off. Exr. 321.*

If the devise be to one executor, he may take by his own assent, without the others. *1 Rol. 618. l. 47.*

So, if there be a devise to all the executors generally, one of them may assent for his part. *1 Rol. 618. l. 50.*

If a wife be executrix, the assent of the husband is sufficient. *Off. Exr. 321.*

And the husband may elect for his wife, to take as legatee. *1 Leo. 216.*

So an executor may assent to a legacy, before probate. *Vide ante, (B. 9.)*

But a *feme covert* cannot assent to a legacy. *R. 1 Sid. 188. Off. Exr. 321. Vide 1 Rol. 618. l. 45.*

Nor, an executor within the age of seventeen years. *Off. Exr. 321.*

If an executor refuse his assent without cause, he may be compelled to it, by a court of equity. *Vide Chancery, (3 G. 4.)*

And if he once assent, he cannot afterwards dissent. *Off. Exr. 323.*

If he assent upon a condition subsequent, the condition is void. *Vide Off. Exr. 340.*

(D) Administration by a Feme Covert.

IF a *feme covert* be named executrix, she may administer, without the assent of her husband. *Off. Exr. 294.*

And if she prove the will, a refusal by the husband is of no avail. *Vide Off. Exr. 293, 4.*

So, if she refuse, an acceptance by the husband is of no avail. *Vide Off. Exr. 292, 295.*

So, if a *feme covert* be next of kin to an intestate, administration shall be granted to her. *Vide Administrator, (B. 6.)*

But if a *feme covert* be executrix, or administratrix, administration by the husband binds her. *Off. Exr. 297.*

So, if he administer without her assent. *Off. Exr. 295. Per Holt, 1 Sal. 306.*

And a gift, or release by the husband alone is good. *1 Sal. 117. Off. Exr. 297.*

So, if the husband alone recover a debt due to the wife as executrix upon a promise to him, it will be a *devastavit* for so much. *R. 1 Sal. 117.*

So, if the husband escoines the goods, it will be a *devastavit* by the wife. *R. Cro. Car. 519. Dy. 210. a. in marg. Vide Baron and Feme, (N.)*

So the wife, without her husband, cannot dispose of the testator's goods. *Vide Off. Exr. 297. 1 Sal. 306.*

So, if the wife alone release a debt without payment, it is not good. *Vide Off. Exr. 297. Cont. 1 And. 117.*

Yet the goods of the testator are not vested in the husband. *Off. Exr. 298.*

And the husband cannot sue, or be sued in right of the testator, without his wife. *Vide Off. Exr. 298.*

(E) Administration by an Infant Executor after 17.

AFTER the age of 17, and before 21, an infant executor may administer. *Vide Off. Exr. 309.*

And may discharge a debt, upon payment. *5 Co. 27. b. Off. Exr. 310. Vide 1 And. 117.*

And sell a chattel real, &c. for payment of debts. *1 Rol. 251.*

So, if a sale by an infant executor be for money for the debts of the testator, and for payment of what he himself owes for necessaries, it will be good. *R. 1 Rol. 730. l. 25.*

Though the sale be at an under value. *R. 3 Leo. 143.*

But a release by an infant executor, for more than he received, is void for so much. *R. 5 Co. 27. Mo. 146. Russell. R. Cro. El. 671. 1 And. 117.*

So, if he release a bond upon payment of the principal; for perhaps there was a reason in equity for the payment of the penalty. *Per three J. Cro. cont. 1 Rol. 730. l. 35. Cro. Car. 409. Jon. 400.*

So any act by him, that will be a *devastavit*, is void. *Semb. 1 And. 117. Cro. Car. 490.*

(F) Administration by an Administrator durante minore ætate.

IF an executor be an infant, administration shall be granted to another during his minority. *Skin. 155. Off. Exr. 307.*

So, if an infant be intitled to the administration, administration shall be granted to another during his minority. *Skin. 155. Vide Administrator, (B. 6.)*

But the administration ceases, when the infant executor attains the age of 17 years. *R. 5 Co. 29. a, b. Vide Pleader, (2 D. 11.)*

And if a woman infant be executrix, when she takes a husband of such age. *5 Co. 29. b. Off. Exr. 307.*

[Administration granted during the minority of four children does not determine on the marriage of one of them to a husband of full age. *Per King, C. and Raymond, C. J. Jones v. Earl Strafford, M. 1730. 3 P. W. 79.*]

[Administration granted during the minority of infant executrix under seventeen, does not determine on her marrying an husband of age. *Per King, C. and Raymond, C. J. denying Prince's Case, 5 Co. 29. to be law, as not mentioned by other reporters of the same case. Ibid.*]

[Nor on the death of one of the infants. *Per King, C. and Raymond, C. J. contrary to Brudenel's Case. 5 Co. Ibid.*]

And if there are several executors, when any one attains such age. *1 Sid. 185. R. 1 Leo. 74.*

Or, if any one dies. *Dub. 5 Co. 9. a. Vide 1 Sid. 185.*

Yet where administration is granted during the minority of one intitled to administration, it does not cease till his age of 21 years. *Vide Administrator, (B. 6.)*

An administrator during the minority of one intitled to administration, has, for the time, all the power and authority an absolute administrator.

So, if a man appoint an infant his executor, and that another shall have the administration during his nonage; he is his executor for the time, and so long has the authority of an absolute administrator or executor. *Semb. Off. Exr. 308.*

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Though he be made by the will administrator only for the benefit of the infant executor. *Ibid.*

So, if administration be granted by the ordinary during the minority of an infant executor generally, the administrator may pay the debts of the testator. *Vide Hob. 250. Vide Off. Exr. 308.*

And if he give his bond for a debt of the testator, he may retain of his goods to the value. *R. Hob. 250.*

So, he may, sell, or dispose of the goods of the testator, if they are *peritura*. *5 Co. 29. b. Vide 1 Rol. 910. l. 45.*

Or, for payment of debts. *Ibid.*

So he may retain for his own debt. *Semb. Ray. 483.*

So he may receive debts due to the testator.

And discharge, and acquit them. *Semb. 3 Leo. 103.*

So he may maintain *trover* for the goods of the testator; for the property is in him. *R. 1 Rol. 910. l. 47.*

Or, other actions for debts due to the testator, &c. *6 Co. 67. b.*

So he may assign a term for years. *Ibid.*

Or, demise it for a less term. *Ibid.*

But, he is only in nature of a bailiff, and ought to account to the executor. *3 Leo. 103.*

So, if he has administration granted to him specially in *commodum executor*, he cannot make leases of chattels real of the testator. *R. 5 Co. 29. b. 6 Co. 67. b.*

If the administrator *durante minore etate* continue in possession of the goods after the executor attains the age of seventeen years, he may be sued by a stranger. *1 Sid. 57.*

And if he has wasted the goods before the full age of the infant executor, he may afterwards be charged upon the special matter. *Lat. 160.*

So the executor at full age shall have *detinue* against him, or a suit in the ecclesiastical court for the goods. *R. 1 And. 34.*

But if an administrator *durante minore etate* administer in part, and deliver to the executor at his full age all the residue, he cannot be charged by a stranger. *R. 1 Mod. 174, 5.*

Or, if he deliver to the executor only part, who releases to him the whole. *Per two J. 1 Mod. 174, 5. Semb. Cro. El. 43.*

(G) Administration by an Executor of an Executor.

IF the executor prove the will of his testator, and die, his executor shall administer to the first testator. *Vide Administrator, (B. 6.)*

[And the executor of an executor who intermeddles with goods, but dies before probate or election made to retain, may retain to satisfy his debt. *Semb. Croft v. Pyke, P. 1733. 3 P. W. 180.*]

But if the executor die intestate, his administrator shall not be executor to the first testator. *Ibid.*

Nor, the executor of another co-executor, who was dead before. *Off. Exr. 143. 1 Sal. 311.*

Nor,

Nor, the executor of the executor, who proved the will, though the other executor, who survived, refused. *Semb. cont. Dy. 160. b. Acc. Hard. 111. R. 1 Sal. 311.*

The executor of an executor has the same interest in the goods of the first testator, as the first executor. *Off. Ex. 370.*

And shall plead *plene administravit*, &c. in the same manner. *Dy. 174. b. Vide in Pleader, (2 D. 9.)*

And ought to administer his goods in the same manner.

By the *St. 25 Ed. 3. 5.* executors of executors shall have actions of debts and goods of the first testator, in the same manner as the testator himself: and shall answer to others as the first executor should do.

By the same statute, he shall have execution of statutes-merchant and recognizances to the first testator.

If a testator has a statute-staple certified into *chancery* and an extent upon it, and before the return of the extent dies, his executor or administrator may sue out a *liberate* upon it without a new certificate, or extent. *Cro. Car. 452.*

And such executor to the executor of *B.* may be named directly, executor to *B.* *R. 1 Leo. 275.*

But before the *St. 17 Car. 2. 8.* If an executor had judgment for a debt of his testator and died intestate, the administrator *de bonis non* should not have had a *scire facias* upon this judgment for want of privity, but ought to have had debt *de novo* for the same demand as administrator to the first testator. *Mo. 4. R. 2 Cro. 4. Mo. 680. Tel. 33.*

So, if an administrator had judgment, his executor, or administrator should not have had a *scire facias* upon it. *R. 5 Co. 9. b. Per three J. 2 Cro. 4. Tel. 33. Mo. 680. R. Tel. 83. R. Cro. Car. 208, 227, 451.*

Otherwise, if the executor, or administrator had judgment, and had sued execution upon it by *elegit*, though the debt was not levied; for thereby the interest was vested in him. *R. 1 Sid. 29. Mod. Ca. 300.*

Or, if the executor, or administrator had judgment for goods of the testator taken out of his own possession, his executor or administrator, shall have a *scire facias* upon it, and account for them to the administrator *de bonis non.* *Tel. 33.*

And now by the *St. Car. 2. 8.* made perpetual by the *St. 1 Jac. 2. 17.* an administrator *de bonis non*, &c. may sue a *scire facias*, and take execution on such judgment after verdict.

And if execution after judgment upon a verdict be sued, and the money levied, the administrator *de bonis non*, &c. may have it. *Mod. Ca. 295, 6.*

Or, by the equity of this statute, if the sheriff had returned, *Reman' pro defectu empt'*, he may sue a *Vend' exponas*, or *Dist' nuper Vic'*. *Ibid.*

So, upon a judgment by default, if the administrator sue execution, and die, when the goods are in the hands of the sheriff, the administrator *de bonis non*, &c. shall have the money brought into court. *R. Mod. Ca. 300.*

So

So the executor of an executor shall have escape against the sheriff, for the escape of one in execution, at the suit of the first testator. *Godb. 262.*

So now, by the *St. 8 & 9 W. 3. 10.* If the plaintiff die after interlocutory, and before the final judgment, the action shall not abate, if such action might originally be sued by his executor, or administrator; but the executor, or administrator may have a *scire facias* against the defendant, or, if he die, against his executor, or administrator; and if the defendant, his executor, or administrator appear, and shew no cause to arrest the final judgment, or, on a *scire feci*, or two *nibils*, make default, a writ of enquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor, or administrator.

So, if the defendant die after interlocutory, before final judgment, the plaintiff, or, if he die, his executor, or administrator may have a *scire facias* against the executor, or administrator of defendant, &c.

But if the defendant die before final judgment, and a *scire facias* is sued against his executor, or administrator, the judgment in the *scire facias* must be against the executor, or administrator, and not against the intestate, though the action was commenced against him. *Semb. 1 Sal. 42.*

(H) Distribution of Intestates Estates.

WHEN the executor had fully administered, and paid all the legacies and debts of his testator, the surplus (if there was any) belonged to himself. * *Vide Chancery 3 G. 7. **

Though he was not named residuary legatee.

So, an administrator, since the *St. 21 H. 8. 5.* was not compellable to account for the surplusage after debts and legacies paid, but only had it to himself; for the statute intended him a benefit. *Mo. 864. Hob. 83. R. Noy. 24. Hob. 191. Vide Cart. 125, 6, 7. R. 1 Lev. 233.*

And, if the ordinary had required a bond of him to make account, or distribution of the surplusage, a prohibition would go. *Cro. Car. 62. R. Cro. Car. 201. Jon. 228. Pal. 527.*

Or, if he had proceeded to enforce a distribution, though the administrator had agreed to make one. *R. Al. 56.*

* So, now since the *St. 22 & 23 Car. 2. c. 10.* If the ordinary compel an executor to make distribution, a prohibition shall go, for the power of the ecclesiastical court to compel distribution extends only to administrators of intestate estates. 1 *Lord Raym. 86. 363. 5 Mod. 247. Vide Chancery 3 G. 7. & 1 Brown's Rep. Ch. 328. **

But now by the *St. 22 & 23 Car. 2. 10.* made perpetual by the *St. 1 Jac. 2. 17.* The administrator shall distribute what remains clear of the intestate's goods, after his debts, funerals, and just expences allowed, to his wife, children, or next of kin, viz.

ONE

one-third to the wife, and the rest to his children, or, (if any of them be dead) their legal representatives: any child, advanced in the parent's life to the value of the dividend, shall have no share with the other children, unless the heir: if advanced, but not to the value, he shall have so much as will make his share equal with the other children: and the heir at law shall have an equal share with the rest, though advanced in his father's life, without regard to his land by descent, or otherwise.

By the same statute, if there be no children, nor representatives of them, a moiety shall be to the wife, the other moiety equally to his next of kin, in equal degree, and their representatives; provided, no representation be among collaterals after brothers and sisters children.

If no wife, all shall be distributed to the children: if no wife, nor children, all to the next of kin equally.

If *A.* died before the stat. but administration was granted afterwards, distribution shall be made. 2 *Ver.* 642.

A brother, or sister of the half blood, shall have an equal share, with those of the whole blood; for he is in equal degree. *R.* 1 *Mod.* 209. 2 *Jon.* 93. 2 *Lev.* 173. *R.* 2 *Vent.* 317. *Sho.* 1. *R. C. Parl.* 108. 2 *Mod.* 205. 1 *Ver.* 403, 4, 437. *R. Carth.* 51. *R.* 2 *Ver.* 124.

[A posthumous brother of the half blood shall take under the statute a share of his intestate brother's personal estate. *Burnet v. Man, M.* 1748. 1 *Vezey* 156.]

Distribution shall be made to the several stocks, which are in equal degree of kin. *Vide Ray.* 500.

And if any be dead, the representative to the remotest degree in a lineal descent, shall be admitted to the share of his parent. *Ibid.*

If there be only one son, or daughter, the whole share of the children goes to him, or her. 3 *Mod.* 63. *Carth.* 52. *Skin.* 212, 218. *R. Pr. Ch.* 21.

If there be a grandmother and also an aunt, the whole goes to the grandmother; for she is nearest. *R.* 1 *Sal.* 251.

If three brothers, who are dead, have several issues, the one two, the other three, the other five, all ten take in equal degree; for they shall take as next of kin, and not in representation to others. *Pr. Ch.* 54.

[If intestate has several brothers and sisters, some of the whole and others of the half blood, who all die in his life-time, all leaving several children, the distribution shall be *per capita*, for they take as next of kin to intestate. If one of intestate's brothers or sisters survives him, the children of the rest must take only by representation, *i. e.* *per stirpes*; and there is no distinction between the whole and the half blood. *Janson v. Bury, H.* 1723. *Clarkson v. Spateman, M.* 1688. *Wall v. Theedham, T.* 1711. *Bunb.* 157. *Dawers v. Dewes, T.* 1730. 3 *P. W.* 40.]

If a son, or daughter die in the life of his father, he shall have $\frac{1}{2}$ without distribution, for he is next of kin.

So, the mother would have had.

But

But now by the *St. 1 Jac. 2. 17.* if after the father's death, any child die intestate, without wife, or issue, in the life of the mother, every brother and sister, and their representatives, shall have an equal share with the mother.

If he die without issue, having a wife, every brother and sister shall have an equal share with the mother, of the moiety distributable. *Per Ld. Chanc. King, June 1726. inter Kelway and Kelway. (Reported 2 Pr. Wms. 344.) Strange 710.*

By the *St. 29 Car. 2. 3.* The statute 22 & 23 *Car. 2.* does not extend to a *feme covert* intestate; but the husband shall have administration, and her personal estate, as before.—This was doubted before. 2 *Mod. 20.*

The *St. 22 & 23 Car. 2. 10.* is introductive of a new law; and therefore, shall be strictly expounded in restraint of distribution. *Ray. 499.*

No one shall have a share as representative, except the issues of a brother, or sister to the intestate, and not of an uncle, or aunt. *Semb. Ray. 500, 502, 506. R. 2 Ver. 169, 233. Pr. Ch. 28.*

[The grand-daughter of sister, and the daughter of aunt of intestate, are in equal degree, and the distribution shall be equal. *Thomas v. Ketteriche, M. 1749. 1 Vezey 333.*]

If a brother of the intestate has a grandson, and a sister has a son or daughter, the grandson shall not have distribution with the son or daughter of the sister. 1 *Sal. 250.*

Every son advanced by the father in his life-time, except the heir at law, shall put his advancement into *hotchpot*, before he shall be admitted to a distribution.

So the heir at law, if he be advanced out of the personal estate.

Though his advancement be only, the use of furniture for his life; for it is an advancement *pro tanto.* *R. per M. of the Rolls, F. g. 285.*

So, the younger son, though he takes as heir of borough English, by descent; for he is not properly heir at law. *F. g. 287.*

[*Borough English* lands shall be brought into *hotchpot*, on the statute of distributions. *Per Jekyll M. R. Pratt v. Pratt, P. 5 G. 2. Str. 935.*]

[But this decree was reversed by *Talbot, C.* who determined that the youngest son should have his full distributive share of his father's personal estate, notwithstanding the descent of lands in *Borough English* to him; and so again in *Lutwyche v. Lutwyche, P. 8 G. 2. C. T. T. 276.*]

So, a portion for a daughter, to be raised out of lands at age, or marriage, will be an advancement to the daughter, when she marries, though she was within age, and unmarried at the death of the testator. *F. g. 285.*

By the *St. 22 & 23 Car. 2. 10.* No distribution shall be, 'till one year after intestate's death.

And then, the party shall give bond with surety to refund his rateable part towards any debt and charges, which shall be recovered

covered against the administrator, or appear due from the intestate. *Vide in Chancery, (3 G. 3.)*

So by the same statute, distribution shall not be, where administration is granted *cum testamento annexo*; for the will shall be pursued.

Yet the next of kin has an interest vested in him before distribution, and if he die within the year after the intestate, his executor, or administrator shall have his share. *Dub. 3 Mod. 59. Skin. 212, 218. R. 1 W. & M. inter Brown and Farendall, Sho. 2. 25. 1 Ver. 403.*

So, if he make a will, and devise his share, it shall go to the devisee. *R. 2 Ver. 559.*

So, if the next of kin be a *feme covert* and die, and then her husband dies before administration to his wife, it goes to the executor, or administrator of the husband. *Dub. 2 Ver. 302.*

[Debts follow the person of the creditor, not of the debtor; therefore if an *Englishman* residing and dying here, and administration taken out here, has debts due to him in *Scotland*, or abroad, they shall be distributed according to the law of *England*. *Thorne v. Watkins, M. 1750. 2 Vezey 35.*]

If an administrator refuse to make distribution, he may be compelled to it in *Chancery*. *Vide in Chancery, (3 D. 1.)*

So any one intitled to distribution may compel him to prove his account, and to be examined upon oath as to it. *R. 1 Sal. 251.*

So a *mandamus* lies to the spiritual court to make a distribution to him, who has a right, if they do it not. *Semb. 1 Sal. 251.*

(1) Devastavit.

(1. 1.) What shall be.

IF an executor, or administrator, sell, embezzel, or convert to his own use the goods of his testator, or intestate, before debts or legacies paid, it will be a *devastavit*.

So if he pays that which need not be paid. *Vide Off. Exr. 226.*

Or, pay a legacy, or a debt of an inferior nature before another of a superior. *Ibid.*

If he discount a debt due from the testator, to a creditor, out of his own debt. *2 Ver. 117.*

So if he dispose of goods at an under-value. *Off. Exr. 227.*

Though they are so appraised. *Ibid.*

So, if he accept a note, covenant, &c. in satisfaction of a debt, which is not paid. *1 Ver. 474.*

So, if an executor, or administrator acknowledge satisfaction upon record of a judgment on a bond, when only the principal and damages are paid, and not the penalty, it will be a *devastavit* for so much as is not received. *Off. Exr. 228. *Qu. of this since the statute, 4 Ann. c. 16. s. 13.**

So, if he release, or acquit the bond, being forfeited. *Off. Exr. 228. Vide post, (1. 2.)*

Or,

Or, cancel, or deliver it to the obligor. *Off. Exr.* 228.

So, if he release an action to another, who took the goods of, or did a wrong to the testator, it will be a *devastavit* to the value of the goods, or damages. *R. Cro. El.* 43.

So, if he submit a debt due to the testator, &c. to arbitration, and the arbitrators do not make a recompence to the full value, it will be a *devastavit* for the residue. *Off. Exr.* 229. *Vide Assets, (C.)*

If he pay a debt upon an usurious contract. *Per Tel. Noy* 129.

So, if he agree with the executor *de son tort*, and accept his covenant for payment, it will be a *devastavit* for so much, though nothing be paid. *R. 2 Jon.* 88. *Vide 1 Ver.* 474.

So, if an executor, or administrator has assets to 100*l.* and is sued in two actions, and confesses judgment to 100*l.* value in each, he shall be charged with 200*l.* as if he had given bond for so much. *3 Lev.* 115.

So, if he be sued upon bond and upon simple contract, and suffer judgment in both, without pleading the bond to the action upon simple contract, or the judgment in the action upon simple contract, to the action upon the bond, he shall be charged with both judgments, though he has assets only for one. *R. 3 Lev.* 114. *R. 1 Sal.* 310, 312.

*So, if he have assets to the amount of 200*l.* and confess judgment in an action for 300*l.* and afterwards suffer judgment by default, in an action for 200*l.* he shall be charged with both judgments, and if he pay the first judgment, the sheriff, to a *fiери facias* on the second, may return a *devastavit*, without a *scire fieri* inquiry. *Lord Raym.* 589.*

So, if he suffer a judgment for principal and interest incurred since the death of the testator, it will be a *devastavit* for the interest. *R. 2 Lev.* 40.

A *devastavit* by the husband binds the wife. *Vide ante, (D.)*

(I. 2.) What not.

But a receipt for so much due upon bond as he receives, is not a *devastavit* for the residue. *Vide Off. Exr.* 228.

Nor, a parol agreement, that he will not sue for the penalty. *Ibid.*

Nor, a delivery into another hand, that it may not be sued. *Ibid.*

So, disposing of the goods of the testator to his use, is no *devastavit*; if he pays debts of the testator to the value, with his own money. *1 Sand.* 307.

So, if he pay a debt of an inferior nature with his own money, though it be to the value of the testator's goods in his hands, it will not be a *devastavit*. *Semb. 1 Sand.* 218.

So, if he lose a bond due to the testator; for he has a remedy for the debt in equity; but he ought to pursue it. *Dub. 2 Ver.* 299.

So, if he compound an action of *trover* for the goods of the testator, and take a bond for the money to be paid at a future day,

day, it is not a *devastavit*; but the money, for which the bond is taken, is assets immediately. *R. 2 Lev. 189.*

So a release by an executor of full age, upon payment of principal and interest due upon a forfeited bond, is not a *devastavit*, *R. Cro. Car. 491. Vide ante, (I. 1.)*

[So, if there are arrears of rent on a lease of leasehold premises, and tenant becomes insolvent, and the administrator releases the arrears, and gives him a sum of money to quit possession; if it appears for the benefit of the estate, he shall be allowed both. *Blue v. Marsbal, M. 1735. 3 P. W. 381.*]

So a *devastavit* by one executor does not charge his companion. *Off. Exr. 232. Dy. 210. a.*

[So if three administrators appoint a receiver, each administrator is liable only for what he himself receives. *Barnes 440.*]

So the executor of an executor shall not be charged by a *devastavit* made by the first executor; for it is personal. *R. 3 Leo. 241.*

Though it be in the case of the king. *3 Leo. 241.*

(I. 3.) Remedy upon a *Devastavit*.

If an executor, or administrator be guilty of a *devastavit*, and there is afterwards judgment against him for a debt of the testator, or intestate, and upon a *fieri facias* thereon, *nulla bona* be returned, a special *scire facias* shall go to the sheriff *quod de bonis testatoris, &c. et si constare poterit quod devastavit, tunc de bonis propriis, &c.* *Dy. 210. R. 5 Co. 32. a.*

Or, if after *nulla bona* returned, a *testatum* be entered upon the roll *quod devastavit*, a writ of enquiry shall be directed to the sheriff, and if by inquisition the *devastavit* be found, and returned, there shall be a *scire facias quare executio non de propriis bonis*; and if upon that the sheriff returns *scire feci*, the executor, or administrator may appear, and traverse the inquisition. *Cro. Car. 527. R. Cro. El. 859. Jon. 418.*

[If a *devastavit* against a *feme covert* executrix, and her husband, is returned, that sufficient goods have come to their hands, which they have wasted and converted to their own use, it is good; the conversion is not necessary, and may be rejected; and judgment shall be *de bonis propriis* of both. *Bellew v. Scott, T. 7 G. Str. 440.*]

If he appears and traverses, and it be found against him, the judgment shall be *de bonis propriis*. *R. Cro. Car. 519.*

So, if he appears, and afterwards makes default. *R. Cro. El. 859. R. Cro. Car. 527, 528. Jon. 417.*

So, if upon the *scire facias* the sheriff does not return *scire feci*, but two *nikils*. *Vide Cro. El. 859. R. cont. 5 Co. 32. a. Vide Cro. Car. 527, 528. ecc. Vide 1 Sid. 337.*

But a *scire facias quare executio non de bonis propriis*, does not lie, without a *devastavit* returned, or found. *R. Noy 7.*

And an executor is not injured by this course; for though he cannot traverse the inquisition, when it does not appear, nor shall have an action against the sheriff for a false return, yet he may be relieved

relieved by an *Auditâ Querela*. *Cro. Car.* 527, 528. *Vide Jon.* 418. *Vide Cro. Car.* 564. *Vide Cro. Car.* 603.

So the sheriff may return a *devastavit* upon the *feri facias*, but it shall be at his peril; for the inquisition is for his security. *R. 1 Sal.* 310. **Lord Raym.* 590.*

So, after a judgment against an executor, or administrator, the plaintiff may have debt against him in the *debet* and *detinet*, upon suggestion of a *devastavit*. *R. 1 Sand.* 217. 1 *Sid.* 398. *R. Cart.* 2. Though the judgment be erroneous 'till it be reversed. *R. 2 Lev.* 161.

*Though the judgment was by plaintiff's testator, and the *devastavit* in the time of plaintiff's testator's life. *Lord Raym.* 971.*

*And plaintiff might have sued a *scire facias* as executor, and upon that a *feri facias*, and might have had a *devastavit* returned thereupon, and upon that a general judgment; and this action is brought in lieu of such proceeding. *Per Holt. Lord Raym.* 974.*

But he shall not have debt in the *debet* and *detinet*, upon a suggestion of a *devastavit*, where he sues upon a bond of the testator. *R. 2 Lev.* 209. *Adm. Cart.* 2. *R. 2 Lev.* 145. 1 *Vent.* 315, 321.

Nor, shall he have a *scire facias* against an executor, upon a bare suggestion of a *devastavit*. *R. 2 And.* 55.

So debt does not lie against the executor of an executor, upon a *devastavit* by the first executor. *R. 1 Vent.* 292.

So, upon a judgment against husband and wife executrix, if she survives, debt does not lie, suggesting a *devastavit* by the husband; for, though chargeable for the wasting by the husband, she shall not be charged *de bonis propriis* for costs recovered against the husband. *R. 2 Lev.* 161.

And by the *St.* 30 *Car.* 2. 7. made perpetual by the *St.* 4 & 5 *W. & M.* 24. executors, or administrators of any, who, as executors *de son tort*, or as administrators, shall waste or convert to his or their own use, goods or assets of any person deceased, shall be liable in the same manner, as their testator or intestate would have been.

And upon this statute, the executor, or administrator of a rightful executor, or administrator, shall be charged upon a *devastavit* of the testator, or intestate; for the word (*administrator*) comprehends him. *R. 3 Mod.* 113.

[Executor *de son tort* of executor *de son tort*, is not liable for a *devastavit* committed by the first, either at common law, or by *Stat.* 30 *C.* 2. c. 7. *Hammond v. Gutliffe*, *T.* 11 & 12 *G.* 2. *Andr.* 252.]

Execution shall be upon a *devastavit*, as for his own proper debt, by *capias ad satisfaciendum*, or *elegit*. *R. 2 Leo.* 188.

But a debt by *devastavit* shall be only of the nature of a debt by simple contract. 2 *Vent.* 40.

And therefore, the executor of him, who was guilty of the *devastavit*, may retain for his debt, before payment of the debt due by the *devastavit*. *R. 2 Vent.* 40.

ADMINISTRATOR.

(A) Administrator ; By the Common Law.

ANTIENTLY the care of an intestate's goods seemed to be under the direction of his lord, unless he died in war; but then it was under the direction of the temporal court, where the goods were. *Seld. Jurisdiction of Testaments*, l. 2. c. 1, 2. And the opinion 9 Co. 38. b. *Hensloe*, that the king had the care of them, is not true. *Seld. ibid.* c. 5.

In the time of king *John*, the king by *Magna Charta* 17 *Job.* granted, *si liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum per visum ecclesia distribuantur.* *Seld. Jurisd. of Test.* l. 2. c. 3. 4.

So, by charter in the time of *R. 1.* *Eq. Ca.* 206.

And upon this foundation it seems, that the ordinary intermeddled with the goods of an intestate.

Or it was granted to them by parliament. 2 *Rol.* 217. *M.*

Though it be said, that administration belonged originally to the spiritual court. 1 *Lev.* 158, 9. 186, 7. 1 *Sal.* 37.

So the king may grant administration by letters patent. *Vide* 1 *Sal.* 37.

And where there is not any of kin to the intestate, the king usually appoints one by his patent, to whom the ordinary grants administration. *Ibid.*

*And where an executor has a legacy, and there is no residuary legatee, nor any next of kin, the executor is only trustee for the crown, on the principal of the king being owner of every thing which has no other owner. *Middleton v. Spicer*, 1 *Brown Rep. Ch.* 201.*

*So where a bastard dies intestate, the king takes his effects subject to his debts. *Doug.* 548. *Dist.* per *Ld. Mansfield*; but this must be taken to mean where the bastard leaves neither wife nor children.*

And the ordinary may commit his authority to another to have care of the intestate's goods. *Pl. Com.* 278, 280.

And might have had trespass for goods taken out of his possession; otherwise, not. *D.* 1 *Rol.* 906. l. 17. 2 *Inst.* 397. *F. N. B.* 120. *D.*

Or, release such trespass; which would be a bar to an administrator afterwards made. 1 *Rol.* 906. l. 30.

But the ordinary, or his committee by writ *ad colligenda bona defuncti* had only the power of an administrator *durante minore etate.* 2 *Inst.* 398.—What power that is. *Vide Administration*, (F.)

And therefore, could only administer, *ad commodum* of the intestate, and not to his prejudice. 2 *Inst.* 398.

And could not give goods, or release debts, &c. 2 *Inst.* 398. *Cont.* as to the disposition of the goods, but *acc.* as to the release of

of debts. *Pl. Com.* 277. *a. b.* 278. *b.* *Acc.* 9 *Co.* 39. *a.* *Dy.* 256. *1 Rol.* 906. *l.* 25. *R.* 8 *Co.* 135. *b.*

Nor, have an action for the recovery of his goods. *2 Inst.* 398. *Pl. Com.* 277. *b.* 278. *b.* 9 *Co.* 39. *a.* *1 Rol.* 906. *l.* 15. *F. N. B.* 120. *D.*

Yet, by the *fl. W.* 2. 19. an action will lie against the ordinary for a debt of the intestate, if the goods came to his hands; which was only an affirmance of the common law. *2 Inst.* 397. 9 *Co.* 39. *b.* 5 *Co.* 83. *a.* *Cro. El.* 409.

So, every action, which will lie against an executor. *2 Inst.* 397. *Pl. Com.* 277. *b.*

And, against the executor of the ordinary, if the goods of the intestate come to his hands. *Pl. Com.* 280. *a.* *2 Inst.* 398. *F. N. B.* 120. *D.*

So, against the committee of the ordinary. 9 *Co.* 39. *b.*

Yet the ordinary shall not be charged beyond the assets which come to his hands. *2 Inst.* 398.

And for so much, he shall be charged, if he retains them in his hands, though he grants administration to another. *Ibid.*

(B) Since the Statute 31 Ed. 3. 11.

(B. 1.) When Administration shall be granted.

BUT now by the *fl.* 31 *Ed.* 3. 11. where a man dies intestate, the ordinary shall depute the next and most lawful friends of the deceased to administer his goods, who shall have an action to demand and recover, as executors, his debts, to dispend for his soul, and shall answer in the king's courts to others, &c. and be accountable, as executors.

And therefore, in all cases, where a man dies intestate, the ordinary ought to grant administration. 9 *Co.* 39. *b.*

Or, enters into religion, which is a civil death. 9 *Co.* 40. *a.*

And he is compellable to do it. 9 *Co.* 39. *b.*

And if he refuse, a *mandamus* shall be granted. *1 Lev.* 187. *1 Sal.* 38. *Vide Mandamus, (A.)*

So, if a man make a will, and all the executors refuse. *Pl. Com.* 279. *a.* 281. *b.* *2 Inst.* 397. *1 Rol.* 907. *15, 35.* 9 *Co.* 40. *a.*

Or, make his will, but do not name any executor.

So, if one executor proves the will and dies, and then the other refuses. *R.* *1 Sal.* 311.

So, if a man name the executor of *B.* to be his executor, and die in the life-time of *B.*; for 'till *B.*'s death, he is in effect intestate. *Pl. Com.* 279. *a.* 281. *b.*

Or, name an executor, to have authority after a year from his death; for during the year he was without an executor. *Ibid.*

So, if he name an executor, who dies intestate, the ordinary ought to grant administration *de bonis non, &c.* *Pl. Com.* 279. *a.* 281. *b.* 9 *Co.* 40. *a.*

If the executor of the king refuse, administration shall be granted *cum testamento annexo.* 4 *Inst.* 335.

So,

So, if an executor be within the age of seventeen years, administration shall be granted, during his minority, viz. 'till his age of seventeen years. *Vide Administration, (F.)*

So, if a person, intitled to administration, be within age, it may be granted to another, during his minority. *Vide post, (B. 6.)*

So, if he be out of the kingdom, it may be granted during his absence. *R. 4 Mod. 15. Lut. 342. Mod. Ca. 304. 1 Sal. 42.*

So, if it be contested, who shall be executor, it may be granted, *pendente lite. Vide Hob. 250. 2 Jon. 134. Per three J. F. g 260. Vide infra cont.*

If the executor be an idiot, *non compos*, or under other natural disability. *1 Sal. 36.*

If the executor writes to the judge of the spiritual court, that he cannot attend the executorship, and desires he will grant administration to another, it will be a renunciation, and he cannot afterwards administer; for there is no form requisite to a refusal. *R. 1 Leo. 135.*

But if a man make a will and an executor, administration granted before probate, or refusal, is void, if the will be afterwards proved; though it was concealed, and not known at the time of administration granted. *Per two J. Weston cont. Pl. Com. 279, 282. 9 Co. 37. R. 1 Leo. 90. Vide Administration, (B. 4.)*

So administration, granted before a refusal, is void; though the executor afterwards refuse. *R. 2 Jon. 72. 1. Vent. 303. 2 Lev. 183. 2 Mod. 147, 149. Dub. Sho. 407.*

Or granted, when the executor becomes a bankrupt. *R. 1 Sal. 36.*

So though it be doubted, who is the true executor, administration granted in the mean time, is void. *Mo. 636. Cont. Semb. supra.*

So, if one executor prove the will, and the other refuse, and he, who proved it, dies, administration shall not be granted during the life of the other. *R. Hard. 111. Dub. Dy. 160. b. Without a new refusal. 1 Sal. 307, 311.*

(B. 2.) By whom it shall be granted.

By the *fl. 31 Ed. 3. 11.* the ordinary deposes the next and most lawful friends to administer.

And within this statute, the king may grant administration, as supreme ordinary. *D. 2 Bul. 4. 1 Sid. 302. 1 Sal. 37.*

The bishop, or metropolitan. *Vide post, (B. 3. 5.)*

So, the guardians of the spiritualties. *2 Inst. 398.*

The commissary, archdeacon, or other ecclesiastical judge is an ordinary within this statute. *9 Co. 41. a. 2 Inst. 398.*

But the delegates cannot grant administration; for their authority is only, *corrigere. Semb. 2 Bul. 3, 4. Vide Prærogative, (D. 14.)*

Yet if the delegates repeal an administration granted by an inferior judge, who is thereby disabled to grant administration *de novo*, then the delegates may grant it. *Semb. Lat. 85. 2 Rol. 233. l. 13.*

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The ordinary has no more power since the *fl.* 31 *Ed.* 3. 11. than before, except to grant administration to those, who have greater authority than himself. 9 *Co.* 39, 40.

And therefore, since the statute he cannot have an action for a debt, &c. to the intestate. 2 *Inst.* 397, 8. 1 *Rol.* 906. l. 23. *Dy.* 247. a.

If an intestate die, having *bona notabilia* in several dioceses, administration shall be granted by the archbishop of the province. (B. 3.)
1 *Rol.* 908. l. 25. 27. When by the metropolitan.

So, if he has *bona notabilia* in several dioceses of the same province, though he has not goods in the diocese in which he dies. 1 *Rol.* 909. l. 30.

Or, in several peculiars within the same province. *Per two* *ff.* 1 *Lev.* 78. *Acc.* 1 *Sid.* 90.

So, if a man die intestate out of the kingdom, the archbishop shall grant administration. 1 *Rol.* 908. l. 29.

So, if the king die intestate, or his executors refuse. 4 *Inst.* 335.

So, if a bishop die intestate, though he has no goods out of his diocese. 4 *Inst.* 335.

So, if administration by an inferior judge be repealed upon an appeal, the court which repeals it, shall grant administration *de novo.* *Lat.* 85.

But, if a man die intestate, having *bona notabilia* in the several provinces, administration shall be granted by each archbishop, for the goods in his province. *Per Hale*, 2 *Lev.* 86. *R. Hard.* 216. *Dub. Cro. El.* (472.) *R.* 1 *Sal.* 39. *Acc.* 2 *Bul.* 4.

If he has *bona notabilia* in Ireland, and also in England, it shall be granted by the archbishop of *Dublin* for the goods in Ireland, and by the archbishop of *Canterbury* for the goods in his province. 1 *Rol.* 908. l. 40. 2 *Lev.* 86. *R. Dal.* 77.

So, if a man die intestate, having goods in a peculiar, and also in a diocese within the same province, administration shall not be granted by the archbishop, but by the bishop for the goods in his diocese, and by the judge of the peculiar for the goods there. *R. Cro. El.* 719. *Vide Administration*, (B. 6.)

Yet if the metropolitan grant administration, when it does not belong to him, it is not void, but only voidable. *R.* 5 *Co.* 30. a. *Mo.* 145. *R.* 8 *Co.* 135. a. *D. cont. Cro. El.* (457.) *Mo.* 693.

Otherwise, if he grant administration for goods in another province; for that is void. *D. Hard.* 216.

But after an administration by the archbishop, if the bishop, to whom it belongs, grant administration, and then the first administration is repealed, the administration granted before, the repeal stands good. *R.* 8 *Co.* 135. b.

So in all cases, where the first administration is repealed, the second stands good, though granted after the grant of the first, and before the repeal of it. *Vide* 2 *Brownl.* 119. When granted by delegates. *Vide in Prerogative*, (D. 14.)

(B. 4.)
What are
bona notabilia.

Bona notabilia originally were not of any certain value; for if a man had to the value of 40s. or a less value in several dioceses, that gave a prerogative to the archbishop. 1 *Rol.* 909. l. 40, 45.

But, in pleading it was necessary to say, that he had *bona notabilia* to such a value; for it was not sufficient to say, that he had *bona notabilia* generally. R. 8 Co. 135. a.

And therefore, it was usual to alledge, that he had *bona notabilia*, viz. to the value of 5l. which seems to ascertain them to such a value. 1 *Rol.* 909. l. 47.

And sometimes they were alledged to the value of 8l. or other certain value. 1 *Rol.* 909. l. 50.

And now by the canon 1 *Jac.* 93. *bona notabilia* shall be 5l. at least, except where by custom, or prescription, they are more. *Vide Off. Exr.* 64. *Vide* 1 *Rol.* 909. l. 51. 910. l. 1.

And hereupon our law in this particular conforms itself to the canon. 1 *Rol.* 909. l. 55.

And *bona notabilia* shall be to the value of 5l. at least in every diocese. 4 *Infl.* 335.

And by custom in the diocese of London, to the value of 10l. by composition. *Ibid.*

But the penalty of a bond shall not be estimated, though the bond be forfeited, if the debt upon it be not 5l. *Off. Exr.* 65.

If a man has goods to the value of 5l. in one diocese, and a term for years of the same value in another, that makes *bona notabilia*; though by the old book of entries they are called *bona mobilia*. 1 *Rol.* 909. l. 10. *Dy.* 305. a. in marg.

So, if he has bonds in another diocese. 1 *Rol.* 909. l. 17. *Dy.* 305. a. in marg.

So, debts due from the king. *Dy.* 305. a. in marg. *Off. Exr.* c. 4. f. 2.

Or, desperate debts. *Off. Exr.* c. 4. f. 2.

And bonds shall be reputed to be goods, in the diocese where they remain at the death of the intestate; not where they were made, or where the obligee died. R. 1 *Rol.* 908. l. 50. 909. l. 25. *Dy.* 305. a. in marg. *Dal.* 77. *Cro. El.* (472.)

An annuity out of a parsonage, in the diocese, where the parsonage lies. *Dy.* 305. a. in marg.

Judgments, statutes, or recognizances, in the place where they are given, or acknowledged. *Dy.* 305. a. in marg. *D.* 3 *Mod.* 324. R. *Lut.* 401. R. *Mod. Ca.* 134. 2 *Mod. Ca.* 244. * *Vid. Ld. Raym.* 855, 856. *

Debts upon simple contract, where the debtor lives. R. *Dy.* 305. a. in marg. *Off. Exr.* c. 4. f. 2.

* As where administration was granted in a peculiar, to an action brought against a person, he pleaded, that at the time of the death of the intestate he resided out of the peculiar; this was held a good plea, for the residence of the debtor out of the peculiar or diocese, constitutes *bona notabilia*. 1 *Ld. Raym.* 562. *

Leases for years, where the land lies, and not where the lease is. *Dal.* 77.

But by the canon 1 *Jac.* 92. goods which a man has with him, who dies *in itinere*, do not make *bona notabilia*. 1 *Rol.* 908. l. 47.

Nor, by the *fl.* 4 *Ann.* 16. salary, wages, or pay, due to any for work in any of her majesty's yards, or docks.

If an intestate has not *bona notabilia*, administration shall be granted by the bishop of the diocese, where he dies. (B. 5.)

Or, if he dies within a peculiar, by the judge of the peculiar jurisdiction. When by an inferior judge.

So, if he has several dwelling places, and dies at one of them, administration shall be granted by the bishop of that diocese.

1 *Sal.* 37.

Though he lives at the other for the most part, and was here only for a day or two. *Ibid.*

Otherwise, if he dies on a journey, &c. *Ibid.*

And a bishop may grant administration out of his diocese; for it is only ministerial. *Lut.* 535.

So a bishop of *Ireland*, being in *England*, may grant administration here, for goods in *Ireland*. *Dy.* 305. a. in marg.

So an archbishop may grant it, though he be out of his province. *R. Lut.* 535.

But if administration be granted by a bishop, or other inferior judge, when it does not belong to him, it is null and void. *R.*

5 *Co.* 30. a. *Mo.* 145.

And in an action by an administrator, to whom administration was granted by the judge of a peculiar, &c. when it did not belong to him, it is a good bar, that no administration was granted.

So, in a *scire facias* by him upon a judgment in *B. R.* or *C. B.* he shall not have judgment; for the administration does not extend to a matter, that appears to be out of the jurisdiction of the ordinary, and the court will not intend any other title, but that which the plaintiff shews. *R.* 1 *Sal.* 40. *Mod. Ca.* 134.

So, if a defendant in execution upon such a judgment escape, such an administrator shall not have an action against the sheriff for the escape. *Per tres Bar.* 2 *Mod. Ca.* 244.

(B. 6.) To whom it shall be granted.

By the *fl.* 31 *Ed.* 3. 11. the ordinary must depute the next and most lawful friends of the intestate to administer.

By the *fl.* 21 *H.* 8. 5. the ordinary may commit administration to the wife, or next of kin of the intestate, or both.

And therefore, administration may be granted to the wife of the intestate, or part to her, and part to the next of kin. *R.* 1 *Sal.* 36.

[If the widow renounces administration, she is not obliged to make oath that none of the intestate's effects are come to her hands, or to exhibit inventory, and notwithstanding she refuses, and the creditors enter a caveat, administration shall be granted to the son. *Ld. Suffolk's Case*, *M.* 7 *G.* 2. *B. R. H.* 9.]

Or, to the father, or other next of kin, and not to the wife. *R. Ray. 93. R. 1 Sho. 351. Acc. 1 Ver. 315.*

Who are next of kin. *Vide Administration, (H.)*

If there are several in the same degree of kin, the ordinary may grant administration to all, or to which he pleases. *Vide ff. 21 H. 8. 5.*

* By *ff. 21 H. 8. c. 5. & 22 & 23 C. 2. c. 10.* the ordinary is to grant administration and to take bond, with condition that the administrator shall duly administer the intestate's effects; that they shall give an account of such their administration, and make an inventory of the goods and chattels, and that they shall pay the surplus to the next of kin.*

* A creditor has a right *ex debito justicie*, as well as the next of kin to sue an administration bond in the name of the ordinary. *Archbp. of Canterbury v. House, Cowp. 140.**

* But the condition of the bond, as to administering truly according to law, is to be intended of bringing in his account, and not of paying the debts of the intestate; therefore a creditor who sues on the bond, shall not assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator; for that would be endless and infinite. *1 Salk. 316.**

And if the administration be only for a limited time, 'till the time at which an executor is appointed, it ought to be to the next of kin. *Semb. Hob. 250. Vide 2 Jon. 134.*

And therefore, the ordinary may grant administration to the sister of the half-blood; for she is in equal degree of kin with the brother of the whole blood. *R. Al. 36. Vide Administration, (H.)*

To the grandfather, or uncle; though the grandfather seems to be preferable. *R. 1 Sal. 38.*

And if it be granted to one not next of kin, it is not void, but voidable. *1 Sal. 38.*

But if a *feme-covert* die intestate, administration shall be granted to the husband *de jure*; and the ordinary has no election to grant it to him, or to another. *D. 4 Co. 51. b. 1 Rol. 910. K. cont. Dy. 251. a. R. acc. per three J. Cro. cont. Cro. Car. 106. Jon. 175. R. 1 Sid. 409. Per two J. Mo. 871.*

[Unless the husband has done some act to exclude himself, he shall have administration, though the wife had a separate estate, and had made a will. *Rex v. Bettesworth, M. 13 G. 2. Str. 1118.*]

[If by articles before marriage, the wife has power to make a will, and to dispose of her leasehold estate; and she makes her will, and *A.* executor, who proves it; yet the husband shall have administration, though the will controul the administration as to the leasehold estate, and a peremptory *mandamus* shall go. *Rex v. Bettesworth, H. 4 G. 2. Str. 891.*]

[If husband has departed from all interest in his wife's fortune, he shall not have administration. *Rex v. Bettesworth, T. 12 G. 2. Str. 1111.*]

If a father die, it shall be granted to his son, before the grandfather, though in equal degree. *2 Ver. 125.*

If a *feme-covert* refuse, it shall be granted to her husband.
F, g. 207.

So, if the next of kin be incapable, administration shall be granted to another: as, if he be an idiot. *Vide* 1 *Sal.* 36.

If he become bankrupt. *Ibid.*

So, if the next of kin be an infant, administration may be granted, during his minority. *Dub. Dal.* 85. *Vide Administration*, (F.)

And administration *durante minore etate* of another need not be granted to the next of kin; for it is not within the *st.* 21 *H.* 8. 1 *Brownl.* 31. *R. Hob.* 250. *D.* 1 *Vent.* 219. *Semb.* 3 *Mod.* 24. *Skin.* 155.

[Spiritual court is not obliged to grant administration *to the father of the deceased* *durante minore etate* of *his son.* *Smith's Case*, *H.* 4 *G.* 2. *Str.* 892.]

And, though an administration, during the minority of an executor, ceases at his age of seventeen years; *vide Administration*, (F.)—*Pleader*, (2 *D.* 10. 11.) an administration, during the minority of one intitled to administration, does not cease 'till his age of twenty-one years. *R. in B. R. inter Thomas and Freake*, *P.* 13 *W.* 3. *Rot.* 102. *R. in C. B. inter Edmonds and Shaler*, *Tr.* 7 *Ann. Rot.* 340. (*Reported Comyns's Reports* 159) *R.* 5 *Mod.* 395. 1 *Sal.* 39.

But it is no incapacity to be an administrator, if the next of kin be an alien. *Gro. Car.* 9.

Or, a *feme-covert*. 1 *Brownl.* 31.

So, if the next of kin refuse, administration shall be granted to a principal creditor.

Yet, if granted to a creditor without a refusal, the next of kin may afterwards repeal it. 1 *Sal.* 38.

So administration *de bonis non* shall *not* be granted to the next of kin, if there be a residuary legatee. *R.* 2 *Lev.* 56. 1 *Vent.* 219.

And if there are several intitled to the residue, it may be granted to any of them. *R.* 2 *Jon.* 162.

And if granted to the next of kin, shall be repealed by the residuary legatee. 2 *Lev.* 56.

Though there be no residue at present. *Dub.* 2 *Lev.* 56.

But it has been since determined, that the spiritual court is not obliged to grant administration with will annexed to the residuary legatee. *Rex v. Bettefworth*, *M.* 7 *G.* 2. *Str.* 956.]

If an executor prove the will, and afterwards make his executor and die, his executor shall be executor to the first testator. *Off. Exr.* 368. 1 *Sal.* 308, 9. *Vide Administration*, (G.)

So, if an executor after probate die intestate, being also residuary legatee, administration to the first testator shall be granted to his administrator. *R.* 2 *Rol.* 159.—*D.* 1 *Sid.* 79.

So, if an executor be residuary legatee, administration *de bonis non* to the first testator shall be granted to his executor, though he refused, or died before probate. *R.* *Dy.* 372. a.

Or, to his administrator, if he died intestate before probate, *R.* *Dy.* 372. a. in marg. *Adm. Jon.* 225. 2 *Rol.* 159. *Hutt.* 31.

But

But the executor of an executor may refuse to have administration to the first testator. *R. 2 Cro. 614.*

And the administrator of an executor, who was not residuary legatee, shall not have administration to the first testator. *Dub.*

1 *Rol. 907. l. 40. Semb. 2 Mod. 101. R. Jon. 225. D. 1 Sal. 309. Vide 5 Co. 9. b.*

Nor, an administrator during the minority of the executor of an executor. *R. Cro. El. 211.*

Nor, an administrator of an administrator. *2 Dy. 112. b. R. 1 Rol. 907. l. 30. D. 1 Sid. 79.*

Nor, an executor of an administrator. *2 Dy. 47. b. D. 1 Rol. 907. l. 42. Semb. 5 Co. 9. b. Vide 2 Lev. 100.*

Yet since the *fl. 22 & 23 Car. 2. 10.* the interest is vested in the next of kin; and therefore, if he die before distribution, his executor, or administrator, seems intitled to the administration *de bonis non.* *R. cont. 3 Mod. 59, 65. Acc. inter Brown and Farendal, Tr. 1 W. & M. Vide Sho. 2, 25. Vide 1 Ver. 403.*

(B. 7.) How it shall be granted.

Administration must be granted in writing under seal, and not by *parol.* *Dub. Dy. 294. b. Sho. 408.*

It may be granted to two, and if one dies, the survivor shall be sole administrator. *R. 2 Ver. 514. Hudson v. Hudson, T. 9 G. 2. C. T. T. 127.*

So it may be granted upon condition, or until the return of such a one. *1 Rol. 908. l. 10.*

[The spiritual court may take a bond for due administration, even where it is *cum testamento annexo.* *Folkes v. Dominique, T. 13 G. 2. Str. 1137.*]

So several administrations may be granted; for goods of the intestate in such a county or place to one, and for goods in such a place to another. *1 Rol. 908. l. 5. Dub. 1 Sid. 101.*

If there be a doubt, to whom administration ought to be granted, it may be granted *pendente lite.* *Carth. 153.*

But if administration be granted *omnium bonorum et creditorum concernen' testamentum* A. that will be a general administration, though only some particulars are mentioned in the will. *Per two J. Berkley, cont. Cro. Car. 294.*

And the ordinary cannot grant administration for part of a debt to one, and for the residue to another. *R. 1 Sid. 100. 1 Sal. 36.*

Nor *pendente lite*, where the will is disputed. *R. Carth. 153.*

[It may be granted *pendente lite* about a will (notwithstanding *Carthew* 153. which was never adjudged) and such administrator may bring actions. Judgment in *C. B.* affirmed in *B. R. Woolaston v. Walker, M. 5 G. 2. Str. 917.*]

If the ordinary does not grant administration to him, who ought to have it, a prohibition, or *mandamus* shall be granted. *Dub. 1 Leo. 240. Lat. 67, 68. Acc. 1 Sid. 280. 370. Sem. Jon. 225, 6.*

(B. 8.) When it may be repealed.

If administration be regularly granted to the next of kin, the ordinary cannot revoke it without cause, and grant it to another; for he has executed his authority. *R. Ray. 93. 1 Sid. 179. D. Sid. 280. R. 1 Sid. 293. 372. 1 Lev. 158, 186, 305. Dub. 2 Brownl. 119. R. Al. 56. Sti. 10.*

Though there be a male administration afterwards; for he ought to take sufficient caution against it. *Per Hale, 1 Vent. 219. Al. 56.*

Though it was granted after a *caveat* entered. *Dub. 1 Sid. 371. 1 Lev. 187.*

And if there be a suit to repeal it in the spiritual court, a prohibition shall go. *Lat. 68. Al. 56. Vide in Prohibition, (G. 18.)*

But if administration be granted, *non vocatis jure vocandis*, it may be repealed. *1 Lev. 305.*

So, if it be granted by a bishop, when there are *bona notabilia*. *R. 1 Lev. 305.*

Or, by the archbishop, when there are not.

So, if it be granted to the next of kin of a wife, and not to her husband. *R. 1 Sid. 409.*

So, if it be granted to one not next of kin. *1 Sal. 38.*

[If intestate leaves a wife, and his sister obtain administration on the common oath, that he left none, &c. it may be revoked. *Harrison v. Weldon, T. 5 G. 2. Str. 911.*]

Or, to the next of kin, when another was residuary legatee. *R. 2 Lev. 56.*

Though there be not then any residue; for there may be afterwards. *Dub. 2 Lev. 56. 1 Vent. 218.*

So, if the next of kin become an idiot, or otherwise incapable. *R. 1 Sid. 373. 1 Lev. 158.*

Or, if it was granted to another, in respect of such incapacity, which is afterwards removed. *R. 1 Sid. 372, 3.*

So, if it be granted to any one of kin with another not of kin; as, to a sister and her husband; for he continues administrator after the death of his wife. *Al. 36.*

So, if it be granted upon refusal of an executor, who had before administered. *Off. Ex. 56, 57.*

Yet if an administration be repealed, *quia improvide*, it shall be granted to the same person. *1 Sid. 293.*

If administration be regularly granted, and afterwards for (B. 9.) cause repealed, all lawful acts by the first administrator remain good. What acts, before repeal of an administration, are good.

So, if administration be regularly granted to him to whom it does not belong, and afterwards repealed upon a citation, all acts by the first administrator are good; as, if he gives the goods of the intestate to another. *R. 6 Co. 18. b. Cro. El. (460.) Per two J. Gawdy cont.—Mo. 396. Adm. 1 Sal. 38.*

Though

Though the gift was with an intent to defeat the second administrator; for it stands good against him, though by the *St. 13 Eliz.* it was void as to a creditor. *R. 6 Co. 18. b.*

And, made *pendente lite* upon the citation. *R. Cro. El. (460.)*

If administration to a creditor be repealed by the next of kin, the creditor shall retain. *1 Sal. 38.*

So, if an administrator assign a term, and upon a citation to repeal the administration it is confirmed, but upon an appeal from this sentence it is repealed, the assignment is good. *R. Ray. 224. 2 Lev. 90.*

(B. 10.) But if administration granted be repealed upon an appeal, all acts are avoided; for the appeal suspends the sentence. *R. 6 Co. 18. b.*

And if the administrator had obtained judgment for a debt of the intestate before the repeal, the defendant shall avoid it by *audita querela*. *R. 2 Sand. 149. 1 Mod. 62.*

If he had judgment and execution against the debtor, it will be no bar in an action afterwards against the same debtor by the lawful administrator. *R. 1 Vent. 349.*

So if administration be granted upon the concealment of a will, and afterwards the will appears, all mesne acts by the administrator are void. *Vide Pl. Com. 280. R. Acc. 2 Lev. 183.*

Though the executor refuse, and do not prove the will when it is produced: for the administration was void, and cannot be of effect by the refusal of the executor afterwards. *R. 2 Lev. 183. Vide Sho. 411.*

So, if the executor do not prove the will, whereby administration is granted to a debtor, if he afterwards prove it, he may sue the administrator for the debt. *R. 1 Leo. 90.*

So, if after administration granted, a new administration be obtained by fraud without a repeal of the first, and the second administrator release, and then his administration be repealed, the release shall be void. *R. Dy. 339. 6 Co. 19. a.*

(C) Executor de son Tort.

(C. 1.) Who shall be.

*WHAT acts make a person liable as executor *de son tort* is a matter of law for the judge to decide; it is for the jury to say whether the acts be sufficiently proved. *2 Term Rep. 99.**

If a man intermeddle with the goods of the intestate without taking administration, he will be an executor *de son tort*. *And the slightest circumstance of intermeddling is sufficient. *2 Term Rep. 97.**

As, if he use, or sell the goods of the intestate. *R. 5 Co. 33. b.*

If he pay debts. *5 Co. 33. b. 34. a. Dy. 105. b.*

If he receive a debt due to the intestate, and give an acquittance for it. *R. Bend. 73. Dy. 166. b. Mo. 14. 1 And. 11. 5 Co. 34. a.*

*If *A* the servant of *B.* sells goods of an intestate, as well after as before his death, though by the intestate's direction, and deliver the money arising therefrom into the hands of *B.* *B.* may be sued as executor *de son tort.* *2 Term Rep. 97.**

*So, if a person having intermeddled in the intestate's affairs has money of the intestate in his hands at the time of an action brought. *Id. Ibid.**

If he cancel a bond, in which the intestate was bound to another, and give his own bond for the same sum. *R. Cro. El. 114. R. Cro. El. 120.*

If he distribute of the goods of the intestate to the poor. *Dy. 166. b. in marg.*

If he milk the cows of the intestate. *Ibid.*

If he take the goods of the intestate to dispose of at his pleasure. *R. 1 And. 11.*

Or, for his own debt. *Vide 5 Co. 30. b.*

*If he take an *absolute* bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor dying, he take and sell the goods; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. *2 Term Rep. 587.**

If he sue, or answer to a suit, as executor.

So, if he take the goods of the intestate into his possession; that makes him executor *de son tort*, when there is no other executor, or administrator. *2 Dy. 105. b. Per Dyer acc. Dy. 166. b. Adm. 5 Co. 33. b. Vide Off. Exr. cap. 14. R. acc. 2 Brownl. 183.*

If he take only a dog of the intestate. *Dy. 166. b. in marg.*

Or any part of his goods. *R. Cro. El. (472.)*

So, if a man has some colour to intermeddle with the goods of an intestate, but exceeds his authority, that makes him executor *de son tort*: as, if a man, who has letters *ad colligenda bona*, sell goods not perishing. *R. Dy. 255, 6.*

If a wife for her *paraphernalia*, take more than is convenient for her degree. *Dy. 166. b.*

So by the *St. 43 El. 8.* If administration by fraud be granted to a person insolvent, &c. who gives goods to *B.* or releases a debt from him to the intestate, *B.* for so much shall be executor *de son tort.*

So an husband, who has goods given to his wife by covin, shall be charged as executor *de son tort.* *R. Cro. El. 406, 810.*

Or, if an husband, after the death of his wife executrix, has goods, which she, being sole, made a gift of by covin. *R. Cro. El. 106. Mo. 396. Vide 2 Leo. 223.*

So, if a man intermeddle with the goods of an intestate claiming as executor, he may be charged as executor *de son tort*, though another be executor, who proves the will. *R. 5 Co. 34. a.*

As, if he pay debts, or legacies, or receive debts, &c. *5 Co. 34. a.*

So,

ADMINISTRATOR.

So, if a man intermeddle, and afterwards another takes administration, he may be sued as executor *de son tort*. *R. Hob. 49. Per Holt, 1 Sal. 313.*

So, if he himself takes administration, he may afterwards be sued as administrator, or as executor *de son tort*, for the goods which he administered before. *R. Cro. El. 102. 2 Brownl. 183. Off. Exr. cap. 14. R. Cro. El. 810.*

So an executor *de son tort* may be sued, though he delivers the goods to him who afterwards takes administration. *R. Cro. El. 565.*—*Cont.* where the administrator has administered to the value of those goods. *Vide post, (C. 3.) Cont.* where he delivers the goods to the lawful administrator before the action; for then he may plead *plena administravit*. *Per Holt, 1 Sal. 313. * 2 Term Rep. 100.**

(C. 2.) Who not.

But if a man put an horse of the intestate into his stable, that does not make him executor *de son tort*. *Per Paston, Off. Exr. c. 14.*

If he pay the funerals, or debts of the intestate, with his own money. *Off. Exr. c. 14.*

If he give, or sell the goods of the intestate to *A.* that does not make *A.* executor *de son tort*. *Dub. Win. Ent. 341. * Semb. cont. 2 Term Rep. 97.**

So, if the owner of the house, where the intestate died, lock up his goods, till he can be discharged from them.

So, if he intermeddle only about his funerals. *Dy. 166. b.*

Or, claim a property in the goods; as, by gift of the intestate, or as *paraphernalia*, &c. *Dy. 166. b. 5 Co. 34. a.*

Or, by writ *ad colligenda bona*. *Dy. 166. b.*

Yet in these cases the defendant must shew the special matter. *Ibid.*

So, if a man take goods out of the possession of the lawful executor or administrator, it does not make him executor *de son tort*. *5 Co. 34. a.*

Or, do not take them out of their possession, if they have administered to the value. *Vide post, (C. 3.)*

Or, if the administration was granted before his intermeddling. *Per Holt, 1 Sal. 313.*

(C. 3.) How he shall be charged.

If a man administer as executor *de son tort*, he is liable to the action of the lawful executor, or administrator. *Carth. 104. Off. Exr. 257.*

Or, to the action of a creditor. *Ibid.*

[A court of equity will not decree against an executor *de son tort* without setting up an administrator. *Eddowes v. Deane, 1 Sc. H. 1718. Bunb. 36.*]

And shall be charged as executor generally, in the writ, and count. 5 Co. 31. a. *Vide in Pleader*, (2 D. 2.) *Vide Off. Exr.* 254.

And, if there be also a lawful executor, they may be joined in the suit, or sued severally. *Off. Exr.* 255.

Otherwise, if there be a lawful administrator; for he cannot be joined in a suit with an executor *de son tort*. *Ibid.*

So, if a creditor take administration, he may maintain debt, &c. for his money against him, who before his administration was executor *de son tort*, as well as trespass, or trover for his goods. *R. Sti.* 384.

If an executor *de son tort* plead, *ne unques executor*, and it be found against him, he shall be charged generally, as another executor, with the whole debt *de bonis propriis*. *Off. Exr.* 257.

If he plead *plene administravit*, he shall not be charged beyond the assets, which came to his hands. *Dy.* 166. b. in marg.

*A legal act done by an executor *de son tort* will bind the rightful executor. *Ld. Raym.* 661.*

And therefore, he shall be allowed, if he pay debts to creditors. *R. 5 Co.* 30. b. *Per Holt, Carth.* 104.

If he pay debts with his own money, he may retain goods of the intestate in his hands to the same value. *R. 1 Sid.* 76.

*And if the rightful executor bring trover against him, he shall recover only so much in damages, as he has administered unduly; and if an executor *de son tort* pay 100l. of the testator's in a bag to a creditor, the rightful executor shall not have trover against the creditor. *Ld. Raym.* 661.*

So, if administration be granted, and the administrator administers to the value of the goods, which the executor *de son tort* took before administration granted, the executor *de son tort* upon *plene administravit* shall be excused. *R. Cro. Car.* 88.

If an executor *de son tort* takes administration, all acts done by him before, are good by relation. *Mo.* 126.

If A. disposes of the goods to B. for payment of funeral charges, and afterwards takes administration, he shall not have trover against B. for the goods. *R. per two J. Holt cont. Sal.* 295. *Skin.* 274. *Vide Carth.* 104.

If an executor *de son tort* take a term for years of the intestate, he shall be chargeable for waste. *R. 3 Mod.* 90. *3 Lev.* 35.

And for the rent. *Vide 3 Lev.* 35.

And upon a judgment against him, the term shall be taken upon a *feri facias*. *2 Jon.* 73. *1 Vent.* 303.

But of a term for years of a reversion he cannot be possessed, and a sale by him will be void. *R. Mo.* 126.

But an executor *de son tort* cannot retain for his own debt. *R. 5 Co.* 30. b. *R. Tel.* 137. *Mo.* 527. *R. 2 Mod.* 51. *D. Godb.* 216, 217. *2 Term Rep. 97.*

Yet if an executor *de son tort* afterwards take administration he may shew it, and then retain it for his own debt. *2 Vent.* 180. Though he take administration *pendente lite*. *R. Sti.* 337.

[If action is brought against A. as executor, who pleads a retainer, and no assets *ultra*; and plaintiff replies, executor *de son tort*;

tort; *A.* rejoins administration granted *puis darrein continuance*; both pleas are consistent, and good. *Vaughan v. Browne*, H. 12 G. 2. *And.* 328.]

By the *St.* 43 *El.* 8. An executor *de son tort* by gift, &c. of an administrator, who had administration by covin, may retain for his own debt.

So the executor of an executor *de son tort* shall not be charged by the common law, but only in equity. *R.* 2 *Mod.* 293.

When an Administrator shall have Relief, or be Relieved against in Equity, *Vide Chancery*, (2 B. 1, 2.)

Pleading in Actions by, and against Executors, or Administrators. *Vide Abatement*, (E. 14.—F. 10.)—*Pleader*, (2 D. 1, &c. 10, &c.—3 L. 12.)

Vide also concerning Administrator, *Administration*.—*Chancery*, (4 A. 9.)—*Covenant*, (B. 1.—C. 1.)

A D M I R A L T Y.

(A) The Antiquity of the Admiralty.

THE admiral and court of admiralty have been time out of mind, and so it was said in the time of *Rib.* 1. *Co. Lit.* 260.

And this appears by several records in the time of *Hen.* 3. *Ed.* 1. *Ec. Co. Lit.* 260. b. 4 *Inst.* 145. 1 *Rol. Abr.* 528. *Seld. Mare Cl.* l. 2. c. 14.

But all the commissions of the king before the time of King *John* are lost. *Seld. Mare Cl.* l. 2. c. 14.

In the time of *Hen.* 3. he was named *capitaneus et custos maris*, &c. *Seld. Mare Cl.* l. 2. c. 14. *Spel. Gloss.* 14, 16.

In the time of *Ed.* 1. *Ed.* 2. &c. there were three named admirals, viz. at *Yarmouth*, *Portsmouth*, and the *Western*, or *Irish Coast*. *Seld. Mare Cl.* l. 2. c. 14. *Spel. Gloss.* v. *Admiral*, p. 15. 4 *Inst.* 145.

And in the 15th *Ed.* 1. *post reditum regis ab Hierosolyma primo introduci videtur admiralli nomen.* *Spel. Gloss.* v. *Admiral* 15.

Et primus admirallus Angliæ videtur Richard Fitz Alan. 10 *R.* 2. *Sp. Gloss.* 15.

The name of admiral seems to be derived *ab Arabico Amir, præfectus, et Græco, ἀδύης, Marinus.* *Spel. Gloss.* v. *Admiral* 12. 4 *Inst.* 147.

(B) The Authority of the Admiral.

THE authority of the admiral depends upon his commission. And he is constituted sometimes for life. 4 *Inst.* 145.

Sometimes, *quamdiu regi placuerit.* Ibid.

And by the *st.* 2 *W. & M.* 2. commissioners of the admiralty (when it is in commission) shall have the same authorities, jurisdictions, and powers, as the lord high admiral.

The admiral has the authority of having several officers under him.

As, the office of vice-admiral in such and such counties.

2 *Leo.* 103.

The office of register in the admiralty. 2 *Geo.* 114.

And such office usually determines with the office of admiral.

Dub. 2 *Leo.* 103. *Semb.* 2 *Leo.* 114, 115.

As to the admiral of the *cinque ports*, *vide in franchises*, (E. 3.)

As to the impeachment of an admiral, *vide parliament*, (L. 31.)

(C) Commissioners of the Admiralty.

BY the *st.* 2 *W. & M.* 2. commissioners of the admiralty always had, and shall have the same jurisdictions, authorities, &c. as lord admiral.

By the *st.* 13 & 14 *Car.* 2. 20. The admiral by warrant under hand and seal, or any two officers of the navy, &c. may impress any ships, boats, &c. needful for his majesty's service, paying so much *per ton* as merchants usually pay.

(D) Perquisites of the Admiralty.

BY the *St.* 2 *H.* 5. 6. *f.* 3. The admiral shall have the forfeiture in all cases (out of the *cinque ports*) as hath been accustomed of right to the office of admiral of *England*.

And therefore, by the usual grant to have *bona piratarum*, the admiral shall have the proper goods of a pirate after his conviction. *R.* 3 *Bul.* 148. *Vide* 1 *Rol.* 285.

So, the goods of traitors, felons, *felones de se*, fugitives, &c. found within his jurisdiction. *Sir L. Jen.* 1 vol. 89, 98.*

The admiral of right has a tenth part of all prize goods. *Sir L. Jen.* 1 vol. 88. * In his charge at a session of admiralty.

[By 13 *G.* 2. c. 4. *f.* 2. The tenth of prize goods is taken away.]

All wrecks, *jetson*, *flotsan*, *legan*, *derelicts*, and *deodands* not granted to the lords of manors, or others. *Sir L. Jen.* 1 vol. 89.

All the goods of the king's enemies taken without commission, or found, or by accident brought within the admiralty commission. *Ibid.*

All fines and amerciaments in the court of admiralty. *Ibid.*

Royal fishes, as whales, *sturgeons*, &c. *Sir L. Jen.* 1 vol. 89, 98.

(E)

(E) Jurisdiction of the Admiralty.

(E. 1.) For all Offences done *super altum Mare*.(E. 1.)
Murder.

THE admiral has consuance, and jurisdiction of all things done *super altum mare* out of any county. 4 *Inst.* 134. *Vide* the *St.* 5 *El.* 5. f. 30. On the main sea, or coasts of the sea out of any county, *cinque ports*, haven, or pier. *Vide* 4 *Inst.* 137.

And therefore, if a murder be *super altum mare*, it may be tried before the admiral. *H. P. C.* 54.

Or, by the *St.* 15 *R.* 2. 3. if it be in great ships hovering in the main stream of great rivers beneath the bridge nigh the sea. *Vide post*, (E. 14.)

But it must be *super altum mare*, and not *in partibus transmarinis*. *H. P. C.* 54.

And the death of the party, as well as the stroke, shall be *super altum mare*. *Ibid.*

So manslaughter *super altum mare* will be within the jurisdiction of the admiralty. *Sir L. Jen.* 1 vol. 93.

Homicide *per infortunium*, *se defendendo*, or as *felo de se* upon the sea, where the coroner does not inquire *super visum corporis*. *Ibid.*

(E. 2.)
Treason.

So high treason done *super altum mare* may be tried by the admiral. *Vide Stat.* 28 *H.* 8. 15. *Vide* 3 *Inst.* 112.

So high treason, murder, robbery, &c. upon the sea flowing between the high-water, and low-water mark; for though, upon the reflux, the land between high and low water is *infra corpus comitatus*, yet upon the flow of the sea, it is within the jurisdiction of the admiral. 3 *Inst.* 113.

If a man surrender the king's ship to the king's enemy upon the sea, it will be treason, as well as if he delivered a fort, &c. upon land; if it is done *proditorie*. *Sir L. Jen.* 1 vol. 86.

So, if he give aid, relief, or intelligence to an enemy upon the sea. *Sir L. Jen.* 1 vol. 86, 92.

Every offence, which will be treason, murder, felony, manslaughter, mayhem, riot, misdemeanor, &c. if committed upon land, will be an offence of the same nature, and shall have the same punishment, if committed upon the sea. *Sir L. Jen.* 1 vol. 86, 97.

(E. 3.)
Piracy.
What shall
be.

So piracy, or depredation upon the sea was triable before the admiral. And an accessory to piracy is triable before the admiral, since the *St.* 28 *H.* 8. 15. 3 *Inst.* 112. *Sir L. Jen.* 1 vol. 94.

*And by *st.* 11 & 12 *Will.* 3. c. 7. f. 10. Persons either on the land, or by sea, aiding, &c. any pirate to commit any piracy, &c. if such piracy, &c. be committed, shall be adjudged accessories before, and persons on the land, or by sea, knowingly receiving, &c. such pirate, or knowingly receiving into their custody, any goods piratically and feloniously taken, shall be adjudged

judged accessaries after the fact, and shall be tried after the course of the laws of the land, according to the *fl.* 28 *H. 8. c. 15.**

By the common law, piracy by a subject was petit treason; but that is taken away by the *fl.* 25 *Ed. 3. 2. 3 Inst.* 113. *H. P. C.* 77.

Piracy is, when a man commits a robbery upon the sea. *3 Inst.* 113. *Sir L. Jen. 1 Vol.* 94.

As, if by violence he seize a ship or the goods of another upon the sea, putting him in fear. *Sir L. Jen. 1 Vol.* 94.

Though the person robbed be a subject of a foreign prince, or state in amity with the king. *Ibid.*

Or, the person, who robs has a commission from a foreign prince, if he, who is robbed, is not an enemy to such prince. *Ibid.*

So by the *fl.* 11 & 12 *W. 3. 7.* made perpetual by 6 *Geo. 1. 19.* A subject shall be a pirate, who commits piracy, &c. or act of hostility against another subject on the sea, by colour of a commission from any foreign prince, &c.

So, a master, or seaman, who feloniously runs away with ship, goods, &c. or yields them voluntarily to pirates, or combines, or attempts to seduce the master, mariners, &c. to yield up or run away with them, or to turn pirate, or go over to pirates.

So, by this statute, and 8 *Geo. 1. 24.* if any assist, or advise any to be so, who commits piracy, or knowingly receive, &c. pirates, or goods piratical, or knowingly trade with, supply, or correspond with pirates, or forcibly board a ship, &c. and though he do not carry off such ship, &c. throw over-board, or destroy any part of the goods.

By 8 *G. c. 24.* Persons declared accessaries to piracy by *fl.* 11 & 12 *W. 3. c. 7.* are made principals, and to be tried according to that statute, and suffer such punishment as principal pirates.*

But it will not be piracy, if the subject of a prince in enmity with another, take, upon the sea, by force the goods of the other enemy. *R. 4 Inst.* 154. *1 Rol.* 175.

Though they are taken and brought into *England*; which is in amity with both states. *4 Inst.* 154. *2 R. 3. 2. a.*

So it will not be piracy, where the man, who lost his goods, was in enmity with the king of *England.* *4 Inst.* 154.

Or, in enmity with the prince, who gave the commission to the captor. *Vide Sir L. Jen. 94.*

Though the captor was a subject of the king of *England*, and took his commission from a foreign prince without licence, which is not lawful. *Ibid.*

Though the person taken be a friend, if he was brought without damage to the port of such prince to have judgment there upon him. *Ibid.*

So it is not piracy, if the taking was within a creek, port, &c. for that will be felony triable at common law. *Mo.* 756. *3 Inst.* 113. *Vide post, (E. 14.)*

If

If it was upon the *Thames*; for it is *infra corpus comitatus*. Per two J. 1 Rol. 175.

By *jus gentium*, the taking of goods by piracy does not alter the property. *God. de j. b. & p. l. 3. c. 9. f. 16.*

But by the civil constitution, the property may be given to the re-captor. *Gro. ibid. f. 17.*

And so it shall be by the law of *Spain*. *Ibid.*

And therefore, where goods taken by pirates are brought to *England*, the owner may take them. *R. 1 Rol. 285. Vide Biens, (E.)*

By a pardon of *all felonies*, piracy is not pardoned. *H. P. C. 77. R. Mo. 756. 3 Inst. 112.*

(E. 4.) — So all other felonies upon the sea are within the jurisdiction of Felony, &c. the admiralty: as, cutting out tongues, putting out eyes, sodomy, rape, larceny, &c. *Sir L. Jen. 1 Vol. 94.*

(E. 5.) The trial for treason, murder, piracy, &c. before the admiral How tried, was according to the course of the civil law; and for this the offender could not be convicted, or executed, without confession, By the *β.* 28 *H. 8. 15.* or express testimony. *Vide St. 27 H. 8. 4. and 28 H. 8. 15.*

And therefore, by the *β. 28 H. 8. 15.* all treasons, felonies, robberies, murders, &c. on the sea, or where the admiral hath jurisdiction, shall be tried, &c. in the realm, as if done on land: and commissions under the great seal shall be directed to the admiral or his lieutenant, and three or four others to be named by the chancellor, &c. to hear and determine such offences, after the course of the laws of this land for like offences done in the realm. So by the *β. 27 H. 8. 4.* all offences upon the sea, except treason.

And such commissioners, or four at least, shall have full power to inquire by jury, &c. and an indictment by them of such offence shall be good, and such process, judgment and execution shall be thereon, as for the like offence at land.

And the jury shall be of the shire within the commission, and no challenge for want of hundred.

And the person convicted shall suffer death, loss of lands, and goods, as for the same offence at land, and have no clergy.

[In cases which would be manslaughter at land, the jury is always directed to acquit. *Foster 288.*]

A commission directed within the jurisdiction of the *cinque ports* shall be to the lord warden, and three or four others, and the trial &c. shall be by the inhabitants of the *cinque ports*, or the members thereof.

And therefore now, the trial may be in the same manner, as for an offence at common law. *Vide 3 Inst. 111.*

If the offender stand mute, he shall be subject to *paine fort et dure*. *H. P. C. 78. 3 Inst. 114.*

But this statute does not alter the nature of the offence, which shall be determined by the civil law, but the manner of trial only. *H. P. C. 77. Mo. 756. 3 Inst. 112.*

Nor

Nor does it extend to offences within creeks, ports, &c. which are within a county, and were felonies at common law. *H. P. C. 77. cont. Mo. 122.*

And therefore, such felony within a creek, &c. is not ousted of clergy. *Mo. 756.*

So it does not extend to an accessory, who, if it was upon the sea, is triable by the admiralty, if upon land, it is not triable at all. *H. P. C. 77. 3 Inst. 112.*

So it does not extend to murder, where the stroke was *super altum mare*, and the death upon land. *3 Inst. 48.*

And though the statute gives a forfeiture of life, lands, and goods, it makes no corruption of blood. *H. P. C. 78. R. 1 Sal. 85. 3 Inst. 112.*

After this statute, the trial before the admiral was disused.

But by the *st. 11 & 12 W. 3. 7.* all piracies, &c. on the sea, or in the admiral's jurisdiction may be tried on the sea, or at land, in his majesty's islands, plantations, &c. to be appointed by commission, under the great seal, or seal of the admiralty, to his majesty's admirals, vice-admirals, rear-admirals, judges of vice-admiralties, commanders of ships of war, or any of them, and such others by name as the king shall appoint. (E. 6.)
By the *St. 11 & 12 W. 3. 7.* and
4 G. 11.

And such commissioners, or any of them, by warrant, &c. may commit any accused of piracy, &c. on oath, and may assemble a court of admiralty consisting of seven persons.

But by the *st. 4 G. 11.* pirates may be tried by *28 H. 8. 15.* as well as this act; and shall be debarred of the benefit of clergy.

(E. 7.) For all other Matters *super altum Mare.*

So the admiralty has jurisdiction of all other matters done upon the high sea: as, of *fofsan, ligan, &c.* *1 Sid. 178.*

By the *st. 13 R. 2. 5.* it is allowed, that the admirals and their deputies may meddle of things done on the sea, as used in the time of *Ed. 3.* the king's grandfather.

So by the *st. 5 El. 5. f. 30.* In matters on the main sea, or coasts of the sea, not being part of the body of any county, nor within the *cinque ports*, nor in any haven, or pier.

And if it be between high and low water mark when the sea flows; for then it is *super altum mare*, though upon the reflux it be *infra corpus comitatus*. *3 Inst. 113.*

So if it be, when the ship is at anchor in the road of *Guinea*, &c. if it be alledged *super altum mare*; for the ship may anchor upon the sea, and the foreign port perhaps is not within land, as a port in *England* is. *R. 1 Rol. 250.*

(E. 8.) For a Truce, or Safe Conduct broken.

So, by ancient custom, the admiralty had jurisdiction to enquire of all offences *super altum mare*, contrary to a truce, or safe-conduct

conduct of the king. *Adm. by the st. 2 H. 5. 6. Sir L. Jen. 1 vol. 96.*

And now by the same statute 2 H. 5. 6. the king by letters patent may appoint a conservator of the truces, safe-conducts, &c. who, by authority of such patent, and by commission of the admiral, may enquire of all offences against them, upon the main sea; the determination of the death of a man, and execution of the same being reserved to the admiral.

And by the same statute, such conservator (having two learned in the law associate in his commission) may enquire within the body of the county, and liberty of his port, of any offence done there against such truce, and king's safe-conduct.

(E. 9.) For Prize Goods.

So by the *st. 13 & 14 Car. 2. 14.* account for prize-goods, &c. excepted out of the act of indemnity, and vested in the crown, and securities for them, or any thing relating to prizes, shall be under the jurisdiction of the admiralty: but this was repealed by the *st. 16 & 17 Car. 2. 6.* as to account by admiral, vice-admiral, masters of ships, or mariners.

And therefore, if a sentence be there for a ship, or goods as prize, a prohibition does not go upon a suggestion, that it was not prize, or that it was acquired upon land. *R. Carth. 474. *Vide Molloy de Jure Mar. 1 vol. 57.**

*The common jurisdiction of the admiralty is limited to things done *super alium mare*; but in matters of prize, the jurisdiction depends not on locality, but on the subject, which is governed by the *jus belli*, and not by the rules of the common law, and belongs exclusively (with all its consequences) to the admiralty. *Doug. 594. et infra.**

*And they may give reparation in damages for personal injuries received on occasion of a capture as prize. *Id. Ibid.**

And the admiralty may enquire, if any defraud the king of prizes, or the admiral of his tenth part, or buy, or receive prize-goods, or break bulk before they are condemned, as prize, or there be a decree for an appraisement or sale. *Sir L. Jen. 1 vol. 88.*

*By the statute 13 G. 2. c. 4. The flag officers, commanders and other officers, seamen, marines, and soldiers on board every ship of war in his majesty's pay, shall have the sole interest and property in every ship and merchandize, which they shall take after the 4th of January, 1739, in Europe; and after the 24th day of June, 1740, in any other part of the world (being first adjudged lawful prize in any of his majesty's courts of admiralty, Great Britain, the plantations, or elsewhere,) to be divided in such proportions, as his majesty, his heirs and successors, shall think fit to order and direct, by proclamation, to be issued for that purpose. *f. 1.**

*And the lord high admiral, or the commissioners for executing the office, for the time being, or any three or more

them, or any person or persons in any part of *America*, or elsewhere, shall, at the request of any *British* owner, giving security, &c. cause to be issued in the usual manner, to such person as the owner shall nominate as commander, a commission, or letter of mark, to take the ships or vessels of his majesty's enemies: and such ships, &c. so taken, being adjudged lawful prize in any of the courts of admiralty before mentioned, shall wholly belong to, and be divided among the owner or owners, and the several persons on board the ship commissioned, aiding and assisting in the capture, in such proportion as shall be agreed on between the owners, and the persons on board. *f. 2.**

*For the mode of proceeding in the adjudication of prize or no prize. See the statute at full length, and *Doug. 614. et infra*, where it appears, that the prize court is of a nature totally distinct from the common court, called the *Instance Court*.*

[By 13 G. 2. c. 4. *f. 17*. Flota ships, galleons, and register ships, bound from *Buenos Ayres* or *Honduras*, shall be tried and condemned only in the high court of admiralty.]

(E. 10.) For a Contract *super altum Mare*.

So the admiralty shall have jurisdiction upon contracts made *super altum mare*. R. Cro. Car. 296.*

And if the contract be good by the law of the admiralty, a libel may be there upon it, though the contract be not allowed by the common law: as, if the master of a ship hypothecate the ship for tackle, or victuals, without the assent of the owner. R. 1 Rol. 530. l. 35. *Hob. 11, 12*.

So he may hypothecate the goods, or the ship. 1 Sal. 34.

[He may hypothecate her during the voyage, but not before it begins. *Lester v. Baxter*, P. 12 G. Str. 695. *1 *Ld. Raym. 578.**]

[The master, for expenses, &c. abroad, may hypothecate the ship, and also make the owners liable. *Samsun v. Braginton*, P. 1750. 1 *Vezey 443*.]

And every contract of the master, by the law marine, imports an hypothecation. 1 Sal. 34.

*And though the contract for repairs be made upon the land, and the money paid there, yet, as the cause of hypothecation arises on the sea, by reason of tempest, &c. the suit shall be in the admiralty court. *Per Holt*. 1 *Lord Raym. 152.**

*So, though the hypothecation be by bill of sale of part of the ship. 2 *Lord Raym. 982.**

So, if the master ransom the ship and goods taken by an enemy or pirate, it will be an hypothecation to himself for the ransom. *Semb. Mod. Ca. 12*.

*And he may libel the ship in the admiralty for repayment of the ransom money. 1 *Lord Raym. 22*. 2 *Lord Raym. 934.**

So, if the master of a ship within age embezzel goods delivered to him to be carried to any port, there may be a libel against him in the admiralty, though he be an infant. R. 1 Rol. 40.

(E. 10.) What contract is allowed by the law of the admiralty.

**Vide Manifesta* at the end of the 3d edition of *Cr. Car.* where the resolutions referred to as in this page are said not to be judicial; and they are accordingly omitted in that edition.

So, if the master of a ship, and the mariners commit piracy, without the notice, or assent of the owner, the ship shall be forfeited by the admiral law, of which our law takes notice. 1 *Rol.* 530. l. 25.

(E. fr.)
What not.

But the master cannot sell the ship, without the assent of the owners, though it be in imminent danger. *Per Hales*, 1 *Sid.* 453.
* 1 *Lord Raym.* 152.*

So, if the master contract, without an express hypothecation, it shall not be allowed to be sued by the law marine. *R.* 1 *Sal.* 34.
* 2 *Lord Raym.* 806.*

So, if the master hypothecate the ship for money not taken for the tackle, victuals, &c. of the ship, it shall not be allowed. *R. Mo.* 918. *Hob.* 12.

[If repairs are done to a ship in *England* by order of the master, there is no *lien* on the ship, or the money it is sold for. *Buxton v. Snee*, *M.* 1748. 1 *Vezey* 154.]

(E. 12.) By the Law Marine.

Laws of
Oleron:

So the admiral shall have jurisdiction of, and may punish every offence, *super altum mare*, which is punishable by the laws of *Oleron*, the law of the admiralty, or the law or statutes of the realm.

The laws of *Oleron* are the ancient usages generally received, which *Rich. I.* in his return from the Holy Land to *Oleron* revised and approved for matters marine, and which all the people of the West afterwards received for those affairs. *Sir L. Jen.* 1 vol. 87.

And by these laws shall be punished, all who take upon them the conduct of ships as masters without skill. *Ibid.*

Masters, who do not pay wages to the mariners, or do not treat them with humanity when wounded, or sick. *Ibid.*

Mariners who are stubborn, thievish, mutinous. *Ibid.*

Who steal buoys, or cut buoys-ropes. *Sir L. Jen.* 1 vol. 87, 98.

Who take goods cast away not wrecks, which ought to be restored to the owners, the salvage being deducted. *Sir L. Jen.* 1 vol. 87.

(E. 13.) By the Usages of the Admiralty.

So by prescription, and by the *St.* 1 *Eliz.* the admiral has the conservancy of the great and navigable rivers, and may enquire of those who take fish with unlawful nets, &c. or destroy the spawn. *Sir L. Jen.* 1 vol. 88, 96.

If foreigners take fish upon the *English* coast, without the licence of the king, or admiral. *Sir L. Jen.* 1 vol. 88.

If any are guilty of a nuisance to the ports, or navigable rivers. *Sir L. Jen.* 1 vol. 88, 96.

Regrate, or forestall victuals upon the sea. *Ibid.*

Make a confederacy ; as, by labourers, &c. that they will not work but at such times, for such a price, or not finish what others begun, &c. *Sir L. Jen. 1 vol. 95.*

Or, confederate upon the sea to receive goods, or deliver them, to import or export them in fraud of the customs. *Ibid.*

To disobey the master, &c. obstruct service, &c. *Ibid.*

If the commander of the navy neglect his duty in requiring the salute of the flag, &c. *Sir L. Jen. 1 vol. 88, 95.*

Or, surrender a ship, &c. to a *Turk*, pirate, &c. without fighting. *Sir L. Jen. 1 vol. 97.*

(E. 14.) Jurisdiction by the *St. 15 R. 2, 3, &c.*

So by the *st. 15 R. 2. 3.* of death of a man, or mayhem done in great ships, hovering in the main stream of great rivers, beneath the bridge of the same rivers nigh the sea, and in no other place of the same rivers, the admiral shall have consufance. *Acc. 4 Inst. 135.* So by the *st. 13 Car. 2. 9. f. 36.* for offences within that statute.

And also to arrest ships in the great floats for the great voyages of the king, and of the realm.

And therefore, for the death of a man, and mayhem, in such ships, the admiralty shall have jurisdiction, though it be *infra corpus comitatus*. *Semb. 4 Inst. 135, 137.*

So by the *stat. 28 H. 8. 15.* in haven, river, creek, or place, where the admiral hath, or pretends to have jurisdiction, *hoc est*, upon the flow of the sea between high and low water mark ; for though it be *infra corpus comitatus* upon the reflux, it is *infra jurisdictionem* of the admiralty upon the flow. *3 Inst. 113.*

But offences in an haven, river, creek, or other place *infra corpus comitatus* are triable by the common law. *3 Inst. 113. Vide st. 5 El. 5. f. 30.*

And all ports and havens in *England* are *infra corpus comitatus*. Per Cook, Godb. 261.

So, land *inter fluxum et refluxum maris*, when not covered by the water. *Semb. 2 Rol. 157.*

And therefore, the admiral cannot proceed for a robbery upon the *Thames*. *R. 3. Bul. 28.*

Nor, upon any coast, shore, or harbour. *R. Mo. 892.*

But the jurisdiction *infra primos pontes* shall be only for death, or mayhem. *Hob. 79.*

And it was said, that the words in the *st. 15 R. 2. 3.* (*infra primos pontes*) ought to be construed, *between the first points, viz.* the Land's End ; for where a man can see from the one side of the water to the other, it is *infra corpus comitatus*. *Ow. 122, 3. Semb. 4 Inst. 135.*

(E. 15.) Jurisdiction for Mariners Wages, &c.

So, sometimes, a jurisdiction is allowed to the admiralty, though the thing strictly does not arise upon the sea: as, if there be a suit for mariners wages; for they may sue there jointly, and the law marine adjudges when they are forfeited. *R. Cro. Car. 296.* Per two J. cont. Mallet, acc. Ray. 3. R. 1 Vent. 146. R. 3 Lev. 60. 1 Sal. 31, 33. 2 Mod. Ca. 379.*

**(Vide Mantissa at the end of the 3d edition of Cro. Car. where the resolutions referred to as in this page are said not to be judicial; and they are accordingly omitted in that edition.)*

*And the ship is the debtor, and by the law of the admiralty, they may attach her, which by the common law they cannot do. *1 Lord Raym. 577.**

*And they may libel the ship, though all the work was done in the river, if they did it in consequence of being hired for an intended voyage, which was never performed. *2 Ld. Ray. 1044.**

*So, though the defendant alledge that the place upon the arrival, at which the plaintiffs intitled themselves, was not a port of delivery, and the admiralty refuse to allow the allegation, yet no prohibition will be granted, for the admiralty is the proper judge of that matter. *2 Lord Raym. 1247.**

[The admiralty law for wages (as that freight is the mother of wages, that none are paid whilst loading and unloading) may be superseded by special agreement, *Campion v. Nicholas. M. 7 G. Str. 405.*]

So for wages of the mate; for he is as a mariner. *R. 1 Sal. 33. *1 Lord Raym. 398, 632.**

[If the mate becomes master during the voyage, he may sue in the admiralty for the wages whilst mate, but not whilst master. *Read v. Chapman. T. 5 & 6 G. 2. Str. 937.*]

[A carpenter may sue for wages. *Wheeler v. Thompson, T. 12 G. Str. 707.*]

[A boatswain may. *Ragg v. King, H. 3 G. 2. Str. 858.*]

Though there be a contract, or charter-party made for them upon land. *R. 3 Lev. 60. cont. 1 Sal. 31. acc. Sir L. Jen. 80. (Argument on admiralty jurisdiction.) *Vide infra, that this is not law.**

Though the contract be for a sum in gross to carry the ship from *Portsmouth to London.* *R. 1 Vent. 343.*

Or, there be any special agreement, or deed for them. *R. Cont. 1 Sal. 31.*

Acc. till such agreement is disallowed. *2 Mod. Ca. 379.*

*The cases in *1 Salk. 31. & 2 Str. 968,* are express, that where there is a *special agreement*, by which the mariners are to receive their wages in any other manner than usual; or if the agreement be *under seal*, so as to be more than a parol agreement, in such the admiralty has no jurisdiction. But if the *common and usual* agreement, generally made by parol, happen to be put into writing, merely, without seal, or the addition of any special agreement, it is no more than a memorandum of the rate of wages,

Q

wages, and does not take away the jurisdiction of the admiralty, *Per Lord Mansfield, 4 Burr. 1944. Vid. 2 Lord Raym. 1206.**

[If the mariners have executed a deed to forfeit their wages in certain circumstances, the admiralty may try whether the deed was fraudulent or not. *Buck v. Atwood, P. 13 G. Str. 761.*]

But a suit shall not be allowed in the admiralty for the wages of the master; for his contract is founded upon the credit of the owners, not of the ship. *R. 1 Sal. 33. Carth. 518. 2 Sho. 86. Sir L. Jen. 81. Ragg v. King, H. 3 G. 2. Str. 858.*

*Nor by the executor of the master. *1 Ld. Ray. 576.**

[But if he lays contract *infra fluxum & refluxum maris, infra jurisdictionem curie amiralitatis*, it is well. *Barber v. Wharton, M. 13 G. Ld. Raym. 1452.*]

So the admiralty has jurisdiction, if there be a suit against the ship itself in the admiralty for the building, mending, saving, or necessary victuals for the ship. *R. Cro. Car. 296.† Ad. Mo. 918.*

So, if the suit be for annoyance or impediment to the navigation of the sea within a river. *R. Cro. Car. 296.*

So, if the suit be for the rescue of a ship, &c. taken by process of the court. *R. 1 Vent. 1.* if the original cause was within their jurisdiction. *R. Sti. 171. *1 Ld. Ray. 446.**

If the suit be there upon a bond given for an appearance there. *Cro. El. 685. Vide post, (F. 8.)*

If the suit be there upon an express hypothecation of the ship for tackle *in partibus transmarinis*. *1 Sal. 34. R. 1 Sal. 35. Dub. 3 Mod. 244. Acc. Mo. 918. Hob. 12.*

Or, for victuals carried from the land to the ship upon the sea, and sold there. *Per Dod. Lat. 11.*

*Though a pilot be a mariner, yet he cannot sue in the admiralty for wages for piloting a ship from *Sea Reach* to *Deptford*, both being within the body of the county, and therefore out of the admiralty jurisdiction. *2 Wilf. 264.**

(E. 16.) Where a Foreign Fact is necessary to be certified into England.

A matter of fact done beyond sea not being known here, a writ was directed to the earl of Holland, to enquire what goods were embarked there. *1 Rol. 530. l. 15.*

Vide post, (E. 20.)

(E. 17.) Execution of a Foreign Sentence.

So a sentence of the admiralty *in partibus transmarinis* may be executed by the admiralty here, upon the receipt of letters missive for that purpose. *R. 1 Rol. 530. l. 5. Agr. 1 Vent. 32. 1 Sid. 320. 1 Lev. 267.*

And, though the party be imprisoned by process of the admiralty here, in execution of a foreign sentence, he shall not be aided upon an *habeas corpus*. *R. 1 Rol. 530. l. 5.*

*Though

†(Vide *Mantissa* at the end of the 3d edition of *Cro. Car. ut supra.*)

Though the sentence of the admiralty *in partibus transmarinis*, executed here, was for a matter upon land, yet a prohibition does not go to the admiralty here, which executes such sentence, if nothing further is done. *Semb. 1 Lev. 267. For the court will give credit to the sentence there. R. Ray. 473. Vide Skin. 59.*

As, if a foreign admiralty adjudge a ship to be a prize, and after a sale here upon land, there be a suit for an account, a prohibition shall not go; for it is only an execution of the sentence, which adjudged it to be a prize. *Semb. 1 Sal. 32. *2 Lord Ray. 893, 936.**

But if there be a suit in the admiralty, to execute a sentence in a foreign court not final, a prohibition goes. *1 Sid. 418. 1 Lev. 267. 1 Vent. 32.*

So a sentence in the admiralty will be final; and the property of a ship, taken upon the sea after a determination there, shall not be tried in *trover*. *R. 3 Mod. 194. Vide Sho. 6. Carib. 32. Skin. 59. Ray. 473.*

*The sentence of a foreign court of admiralty is *conclusive* against all the world, in all *civil* suits, as to all matters within its jurisdiction, and *decided* by the sentence. *Doug. 575.**

*But it is not *conclusive* as to any point not making the foundation of the sentence. *Id. Ib.**

So after an acquittal for murder in *Portugal*, the party shall not be tried here. *3 Mod. 194.*

So, after a sentence there, it shall not be examined here in equity. *1 Ver. 21. Ca. Ch. 237, 8.*

But before sentence, by consent to waive the proceeding there, it may be determined here. *1 Ver. 21. 2 Ca. Ch. 75.*

(E. 18.) The Manner of Proceeding in the Admiralty.

(E. 18.)
Process.

The first process in the admiralty is against the ship, and goods. *Godb. 260.*

And no other process can be executed upon the water. *Sir L. Jen. 1 vol. 82.*

(E. 19.)
Caution.

After the execution of process, the defendant shall give caution, or security. *Godb. 260.*

And the caution may bind the heirs; for, by the civil law, that comprehends his executors, or administrators. *Godb. 261.*

(E. 20.)
Libel.

If a libel be founded upon a contract registered beyond sea, the plaintiff upon his oath exhibits his copy, which the defendant must confess or deny. *Sir L. Jen. 1 vol. 82.*

If he confesses it, it is so much a proof of the instrument, that the court will adjudge upon the contents. *Ibid.*

If he deny it, the plaintiff shall have a commission *pro scrutando* upon which the copy exhibited, being examined with the original in the hands of a public notary in the foreign country, who is certified by a magistrate to be a man of credit, the instrument exhibited has an authentic proof. *Ibid.*

To the libel the defendant ought to make answer.

He may plead matter for his discharge, which will be good by law, and if it be refused, or determined contrary to a statute, a prohibition shall go: as, the statute of limitations. *R. Hard.* 502. (E. 21.) Plea.

Execution in the admiralty may be against the person of the defendant. *Per Cook, Godb.* 261.

And he may be taken upon it, in any county in *England.* *Per Sanders, Skin.* 93. (E. 22.) Execution.

And the admiralty may chuse his prison as they please. *Sav.* 12.

And if any one be committed to any person, as the servant of another, the master shall answer for him. *Ibid.*

If a person, taken in execution upon a sentence of the admiralty, bring an *habeas corpus*, he shall not be discharged, if the cause do not appear out of their jurisdiction, though irregular; for he ought to have made an appeal. *Sti.* 129.

If by the sentence the ship, &c. are to be sold, the plaintiff, or his executor, may institute a suit against any, who has sails, &c. in his custody. *Carth.* 166.

But execution out of the admiralty shall not be against the lands of the defendant. *Per Cook, Godb.* 261.

As to the court of admiralty in *Scotland,* vide *Scotland,* (D. 12.)

(F. 1.) When the Admiralty has no Jurisdiction.

BUT the court of admiralty has no jurisdiction in any cause which arises upon land, or within any county. *4 Infl.* 134, 135.

And by the *st.* 13 *R.* 2. 5. it was enacted, that the admiralty meddle not with things done in the realm, but only on the sea.

By the *st.* 15 *R.* 2. 3. all contracts, pleas, complaints, &c. arising within the body of the county, as well by land as by water, and wreck of the sea, shall be determined by the laws of the land, and not before, or by the admiral. *4 Infl.* 134.

And by the *st.* 2 *H.* 4. 11. the party grieved by any suit contrary to the *st.* 13 *R.* 2. shall have an action on the case against the prosecutor, and recover double damages, and 10*l.* to the king.

And if a suit be there for a matter out of their jurisdiction, the party is in danger of a *præmunire*. *4 Infl.* 139.

For, if by the libel it appears to be out of their jurisdiction, an indictment for a *præmunire* lies upon the *st.* 13 & 15 *R.* 2. *Semb.* 2 *Leo.* 182.

But not, where the admiralty has a colour of jurisdiction. *R.* 2 *Leo.* 183.

So the admiralty cannot assess a fine; for it is not a court of record, but proceeds according to the course of the civil law.

R. 12 *Co.* 104. *4 Infl.* 135.

Nor can they take a recognisance. *4 Infl.* 135. *Dub. Godb.* 160. *Vide post,* (F. 8.)

A writ of error does not lie upon the sentence there, but an appeal. *4 Infl.* 135. *Vide post,* (G.)

But

But they may take a stipulation in nature of bail by recognisance, and the party may sue there upon it. *R. Ray.* 78. (*Vide* 2 *Ld. Ray.* 1286.)

So they may take a stipulation for security from part-owners, to answer to the other owners, who refuse to join in the voyage, the value of their interest in the ship, if it be lost. *Cont. Carib.* 26. But there the security was by recognisance. *Semb. acc. Mod. Ca.* 162. *Semb. per B. R. between* P. 5 G. 2. and there were cited a case between and and a case between

and to be so determined. *R. acc. per Exch.* P. 5 G. 2. between and *Acc. F.* g. 197. (*Vide Ld. Ray.* * 223. 235. 1286. *acc. & 1 Wilf.* 101. *acc.* *)

[If a man be libelled for piloting a ship contrary to *stat.* 3 G. which enacts that none shall pilot a ship from *Dover*, &c. up the *Thames*, before he shall be examined, approved, and admitted into the society of *Trinity-House*, under a penalty of 10*l.* and to be sued in the court of admiralty of the *Cinque Ports*, if the offender be found within their jurisdiction; and it appears that he had been *admitted*, and afterwards *removed* and *expelled*, he is not within the words nor meaning, and prohibition shall go. *Pierce v. Hopper*, *H.* 6 G. *Str.* 249. *N. B.* This is altered by *stat.* 7 G. c. 21. *f.* 14.]

(F. 2.) Prohibition; when it goes.

(F. 2.)
If the suit
there be for
a thing
within the
body of the
county.

So, upon motion, after a suggestion, that the suit in the admiralty is for a matter out of their jurisdiction, and after oyer of the libel, and day given to the party, a prohibition goes. 4 *Inst.* 135, 6. *Vide Prohibition.*

As, if the libel there be upon a contract, plea, or complaint made by water, or by land, within any county of the kingdom. *R.* 4 *Inst.* 134, 135. 1 *Rol.* 531. *l.* 32, 532. *l.* 35. *R.* 2 *Brownl.* 37. *R.* 1 *Leo.* 105, 7. *Ow.* 123.

As, within any port or haven; for though it be within the flux and reflux of the sea, and below the first bridges, yet the port, or haven, is within the body of the county. 4 *Inst.* 138, 141. *Mo.* 892. *R.* 2 *Rol.* 49.

Or, upon the river of *Thames*. 4 *Inst.* 139. 1 *Rol.* 531. *l.* 35. *R.* *Mo.* 916.

Or, in a place above the low water mark. 4 *Inst.* 139, 140.

Or, in any water, where one may see from one bank to the other. 4 *Inst.* 140, 141. *Ow.* 122, 3. *Mo.* 892.

In any coast, shore, or harbour. *R.* *Mo.* 892.

So if the libel be for a ship itself being in a port or haven, a prohibition goes. *R.* 2 *Cro.* 514.

Or for arresting a ship in any port, unless it gives security not to trade to the *Indies*. *Ray.* 490.

Or, for *stotfan* within the body of the county. 1 *Sid.* 178. *Vide post*, (F. 7.)

[When

[When a contract for wages is special, or under seal. *Hewe v. Nappier*, M. 7 G. 3. 4 B. M. 1944.]

So, if the libel there be for a matter done upon land *in partibus transmarinis*: as, upon a contract in *Spain*, *Dantzick*, the *West Indies*, &c. R. Hob. 11. 79. R. 4 *Inst.* 134, 139. R. 1 *Rol.* 528. l. 50. 529. l. 22. 531. l. 25, 30, 45. R. *Cro. Car.* 603. cont. *Cro. Car.* 296. * *Per two J. Fl. cont.* 2 *Brownl.* 10, 16, 37. R. 12 *Co.* 104. *Dub.* 2 *Rol.* 493, 497. Sir L. *Jen.* 1 vol. 79. (F. 3.) For a matter upon land in *partibus transmarinis*.

* So if the libel be against the ship and owners, a prohibition lies *quoad* the owners. 2 *Ld. Raym.* 984. * (Vide *Mantissa* at the end of the 3d edition of *Cro. Car.* where the resolutions referred to as in this page are said not to be judicial; and they are accordingly omitted in that edition.)

Or, upon an indenture, bond, or specialty made upon land *in partibus transmarinis*: R. 4 *Inst.* 134, 140. *Semb. cont. Leo.* 232.

So, if the libel be upon a charter-party, which obliges him to do a thing beyond sea. R. 4 *Inst.* 135. *Debated* but not R. *Godb.* 385. *Vide post*, (F. 4.)

Or, upon a charter-party to go to parts beyond the sea. 4 *Inst.* 139.

So, if the libel be for trees cut down in *Spain*. 1 *Rol.* 133.

So, if the libel be upon a bill of exchange payable in *London*, for merchandize in *France*, &c. R. 1 *Rol.* 533. l. 30.

So, though the thing be done *supra altum mare*, if the original of the act was upon land: as, if a promise, or agreement, be made upon land, that the ship shall safely go her voyage, and she is lost *super altum mare*. 4 *Inst.* 139. (F. 4.) If the original be upon land, though the act be completed upon the sea.

Or, if there be a policy of assurance upon land to the same intent. 4 *Inst.* 142.

So, if there be a covenant, or agreement to do a thing, and the breach is made upon the sea; for the contract and breach are both requisite to maintain the action. R. 1 *Rol.* 529. l. 15. *Hob.* 212. R. 1 *Vent.* 32.

So, if the charter-party, covenant, &c. require the thing to be done upon the sea. R. 1 *Rol.* 533. l. 5. 4 *Inst.* 139.

So, if a contract upon the sea be written, and executed upon the land, and afterwards broken upon the sea. R. 1 *Rol.* 532. l. 20. *Hob.* 212.

So, if the suit be for taking ballast without the licence of the *Trinity company*, who claim the sole ballasting of ships by the king's letters patent. R. 2 *Brownl.* 13.

So, if the action be founded upon an act, which is done partly upon the land, and partly upon the sea: as, if a ship is taken upon the sea, and carried to a place within the body of the county. 4 *Inst.* 140. (F. 5.) Or, the act was part upon the land, and part upon the sea.

If a contract made upon the sea be written, and sealed upon the land. R. 1 *Rol.* 529. l. 5, 10. 532. l. 20. *Hob.* 212.

If a contract be upon land, for the tackle of a ship upon the sea. R. 1 *Sal.* 34.

Yet

Yet if the libel be founded upon one single continued act, which was principally upon the sea, though part was upon land, a prohibition will not go: as, if the mast of a ship be taken upon the sea, though it be afterwards brought to shore. *R. 1 Rol. 533. l. 13.*

If a contract upon the sea is only written upon the land, without putting a seal to it. *1 Rol. 529. l. 13. Hob. 212.*

If a libel be for restitution of money agreed upon the sea to be paid for the ransom of a ship from pirates; though it was borrowed afterwards for payment, upon land. *R. Hard. 183.*

If a ship be taken by pirates upon the sea, though afterwards sold by them upon land; for their seal is null. *1 Vent. 308. * 1 Ld. Raym. 271.**

(F. 6.)
Or, after
an act upon
the sea, the
property is
altered
upon the
land.

So, if a libel be for a matter, when the original was upon the sea, but afterwards there is an act upon the land, whereby the property is altered: as, if goods taken by pirates are sold upon the land in *market-overt*, and the vendee is sued in the admiralty, a prohibition goes; for the property shall be determined by the common law. *R. 1 Rol. 531. l. 52, 530. l. 50. R. cont. 2 Sand. 260.* But there the sale was not in *market-overt*. *R. acc. 2 Brownl. 29. Vide infra.*

So, if goods confiscated in *Spain*, are sold upon land. *1 Rol. 529. l. 30. 532. l. 5. R. Hob. 212.*

If the mariners commit piracy, whereby the ship is forfeited, and seized, and at the return the owner takes the tackle, for which he is sued in the admiralty. *R. 1 Rol. 532. l. 40.*

[A prohibition shall go to a suit for seaman's wages if the ship is seized and condemned, not if the claimant submits, compounds, and pays a fine. *Minnett v. Robinson, M. 1722. Bunb. 121.*]

If the mast of a ship taken upon the sea and brought to shore, be seized by *B.* upon the land. *R. 1 Rol. 533. l. 10.*

If a ship, taken by enemies upon the sea, be afterwards retaken, whereby the property is altered, it shall be tried by the common law. *Semb. 1 Vent. 174, 308. R. 2 Brownl. 11. 4 Inst. 154.*

If the sails, or tackle, of a ship be sold or pledged upon land. *Sho. 178, 179.*

Yet, where the admiral has consuance of the principal, he shall have jurisdiction of the incident: as, if goods taken by pirates are sold upon land, there may be a libel against the vendee in the admiralty. *R. 2 Sand. 260. 1 Vent. 173, 4. 308. 2 Lev. 25. R. Cro. El. 685.*

So there may be a libel in the admiralty, if a ship taken upon the sea be stranded or damaged, in the haven. *R. 1 Sid. 367. R. 1 Lev. 243.*

So there may be a libel by the owner of the ship for the sails and tackle, though they are upon land; for they belong to the ship. *R. Sho. 179.*

(F. 7.)
If the suit
be for a
wreck.

So, if there be a libel upon the admiralty for a wreck; for by the *st. 15 R. 2. 3.* wreck is expressly mentioned to be determined by the law of the land. *4 Inst. 134, 154.*

So, if the libel there be for goods floating upon the sea, and afterwards cast upon the land; for that is wreck. *R. 1 Rol. 531. l. 40.*

So, if the libel be for *flotsan*, when it was wreck, if that be suggested, a prohibition goes. *R. 1 Rol. 529. l. 25. R. 2 Mod. 294.*

If the libel there be for the goods of a pirate, which are granted to the admiral. *R. 3 Bul. 148.*

So, if the suit there be to avoid a deed, patent, or grant, &c. (F. 8.)

Though it be a patent by the admiral himself of the office of vice-admiral; for the validity of the grant shall be determined by the common law. *Semb. 2 Leo. 103.* For avoiding a deed, patent, &c.

So, if the suit there be upon a bond, though made upon the sea. *Hob. 12.*

Or, upon a recognizance taken there to answer the value of their shares to the lesser number of part-owners in a ship, who dissent to the voyage, to which the greater number agreed. *R. Carth. 27. Semb. Hard. 474. Vide ante, (F. 1.)*

Or, to charge any one criminally. *Sti. 171. 340.*

(F. 9.) At what Time a Prohibition shall go; and when not.

If the suit appears out of the jurisdiction of the admiralty, a prohibition goes, though the party has allowed the jurisdiction there. *2 Brownl. 30.*

Though it be after sentence there. *Ibid. * 5 1 Ld. Raym. 272. **

Or, after a sentence affirmed upon appeal to the delegates. *Sir L. Jen. 1 vol. 81.*

[After sentence, the want of jurisdiction must appear on the face of the proceedings. The word *covenanted* is not sufficient to shew it was by deed; nor though a copy of the articles are annexed to the plea. *Buggin v. Bennett, P. 7 G. 3. 4 B. M. 2035. * Vid. 2 Term. Rep. 649. **]

But where the party has allowed the jurisdiction of the admiralty, he cannot have a prohibition upon a suggestion, unless it appears upon the libel to be out of their jurisdiction. *2 Brownl. 30. Vide 2 Mod. 196, 7. * Vide Prohibition, (D.) **

So a prohibition is not granted *ex officio*, without motion in court. *4 Inst. 136.*

Nor in vacation, or by a judge in his chamber. *Ibid.*

Nor without *oyer* of the libel, and day given to the other party to answer, and hearing of their counsel, if upon notice he will answer. *Ibid.*

Nor shall a prohibition be granted, if the offence or fact is not alleged expressly to be done *super altum mare*, though the words imply as much. *1 Vent. 308.*

So a prohibition shall not be granted upon a suggestion of the plaintiff, that he has a property, if this was not pleaded there and refused. *R. Carth. 166.*

So, generally, a prohibition shall not be granted upon process out of the admiralty, upon an *affidavit*, that it was for a cause upon

upon land; but a libel shall first be exhibited. *R. 1 Sal. 35. R. Mod. Ca. 12, 13. R. Skin. 92, 3.*

So, there shall be no prohibition, for refusing the copy of a libel; for the *st. 2 H. 5.* does not extend to the admiralty. *Per Holt, Sal. 553.*

So there shall be no prohibition, for a cause actionable by common law; if the defendant will not give an appearance. *Sal. 548.*

So it shall not be, generally, before appearance there, and libel. *R. 1 Sal. 35. Mod. Ca. 11. * 2 Ld. Raym. 933, 934. **

[It may be granted upon a warrant to seize a ship before the libel is exhibited. *Powel v. Robinson, T. 1716. in Sc' Bunsb. 9.*]

[Refused; though an affidavit that the contract was at land, and though often granted formerly; the admiralty having altered the form of their warrants, by order of court of *exchequer*. *Q. How? Roberts v. Cadd, H. 1727. Bunsb. 247.*]

[In a suit by one part-owner, against another who will go to sea in the ship, to oblige him to give security; prohibition shall not go, 'till security offered and refused. *Dimmock v. Chandler, H. 4 G. 2. Str. 890.*]

[If the suit be to *sell*, or give security; prohibition goes as to the sale, but not as to the security. *Ouston v. Hebben, T. 18 G. 2. Wilf. 101.*]

(F. 10.) Action upon the *St. 15 R. 2. and 2 H. 4. 11.*

So an action lies upon the *st. 15 R. 2. and 2 H. 4. 11.* upon process issuing out of the admiralty for stay of a ship, though there be no further proceeding; for that is a suit. *R. 3 Lev. 353. 1 Sal. 32. Skin. 334, 361. 4 Mod. 179, 180.*

And it lies against him, who procures, and is at the charge of obtaining the process; though it be granted at the instance of the king's advocate, and by order of the king's counsel; for he, at whose charge it was, is the prosecutor. *R. 3 Lev. 353. 1 Sal. 32. Skin. 361. 4 Mod. 179, 181.*

Though he who acts, does it by the authority of a corporation, and as a member of it. *R. 3 Lev. 352. 1 Sal. 32.*

So it lies after a sentence affirmed by the delegates, and payment of the money decreed. *Sir L. Jen. 1 vol. 81.*

But an action does not lie against a mere attorney, or solicitor in the cause. *3 Lev. 352. 1 Sal. 32. Vide Godb. 386, 389.*

For the proceeding in this action, *vide Pleader, (2 S. 25.)*

As to the court of admiralty in *Scotland*, *vide Scotland, (D. 12.)*

(G) Appeal.

[THE court of admiralty as well as the court of chivalry, proceeds according to the rules of civil law, except in cases omitted. And no appeal lies from them, except from a definitive sentence, or from a final interlocutory decree, having the

AD qu
tende
him, or

the force of a definitive sentence, or what they call *gravamen irreparable*. *Blunt's Case*, T. 1737. 1 *Atkyns* 295. * 2 *Ld. Raym.* 1248. *]

If there be an appeal from a sentence in the court of admiralty, it may be to the king in *chancery*, who thereupon makes a commission to delegates. 4 *Inst.* 339.

And by the *st.* 8 *El.* 5. the sentence of the delegates shall be final.

An appeal lies upon a sentence for the possession, as well as for the right, and interest of goods. *R. Mo.* 814, 815.

* But from the prize court, appeal lies to commissioners consisting of the privy council. *Doug.* 614. *

If there be a sentence in the admiralty within the *Cinque Ports*, an appeal lies to the admiral of *England*, being warden of the *Cinque Ports*. *Dub.* 2 *Jon.* 67. *Semb. cont. Ca. Ch.* 306.

And he may make delegates to determine it. *Dub.* 2 *Jon.* 67.

The same evidence shall be given upon the appeal, as was allowed at first.

But if an examination at first was of witnesses *vivâ voce*, they shall be re-examined *vivâ voce* upon the appeal, and not the minutes of their depositions taken by the clerk only read, except where the witness is dead. *R. Sal.* 555.

As, upon an appeal to the sessions from an order of two justices of peace. *Ibid.*

In an appeal to the commissioners of appeal from an order by the commissioners of excise. *Ibid.*

So, if there be a sentence upon default after public notice, the party upon the appeal may exhibit new allegations, and disprove the ground of the sentence. *Carth.* 476.

ADMISSION AND INSTITUTION.

Vide Esplise, (I.)

A D M I T T A N C E.

Admittance to Copyhold.

Vide Copyhold, (D. 2.—G. 1, &c.)

Admittance to a Spiritual Office.

Vide Prohibition, (G. 4.)

A D Q U O D D A M N U M.

(A) When it lies.

Ad quod damnum is a writ to enquire, whether a grant intended to be made by the king, will be to the damage of him, or others. *F. N. B.* 221, 222.

* The

*The writ of *ad quod damnum* lay where a man intended to give lands or tenements in mortmain, as to a religious house, or to a body politic in fee simple; then it was necessary for him to have a licence from the king, and the chief lords of the fee, before he could make such gift or grant: before the licence could be granted, it was necessary to sue this writ out of *chancery* directed to the escheator, to enquire by a jury whether it would be to the loss of the king, or of any other, that such licence should be granted, and if to the loss, what that might be. *F. N. B.* 221.*

And antiently, upon every grant, release, confirmation, or licence of estate by the king, the usage was to have a writ of *ad quod damnum*, and after an inquisition certified and returned upon it, to make the grant, &c. *F. N. B.* 226. *H.*

So now it is necessary, if there be no dispensation by *non obstante*. *R. 3 Lev. 222. F. N. B.* 222. *D.*

As, before the grant of a licence to alien, or give in mortmain. *F. N. B.* 222. *a.*

Or, to exchange lands with an house of religion. *F. N. B.* 223. *E.*

So, before a grant to the king's tenant, of a licence of alienation. *F. N. B.* 224. *H.*

So, if a man would make a ditch in his own land, to draw the water from the king's pool by the ditch to his mill, before the king's grant of a licence to do it, he ought to have a writ of *ad quod damnum*. *F. N. B.* 225. *D.*

Or, if he would make a new trench, and stop an ancient trench, by which vessels passed from the sea to a town. *F. N. B.* 225. *E.*

The form of the writ of *ad quod damnum* varies according to the letters patent by which the licence is granted. *F. N. B.* 224. *A.*

*The owner of land over which there is an open road, may inclose it, by his own authority, or alter it by the legal course of a writ of *ad quod damnum*; if by his own authority, he must repair it 'till he throw up the inclosure, and he must leave sufficient room for the road: if by *ad quod damnum* he is not bound to repair the new road, unless the jury impose such a condition upon him; if they do not, the repair stands just as it did before.

1 *Bur.* 465.*

[It is sufficient if it is executed in a fair and open manner, but no notice is requisite. *Ex parte Venor, H.* 1754. 3 *Atkyns* 766.]

[It is not necessary that the whole of the new road go through the ground of the person suing out the writ. *Ibid.*]

[Where the new road is all in the same parish with the old, the parish (when it is once made) should keep it in repair; if in another parish, the person who sues out the writ. *Ibid.*]

[In cases of *ad quod damnum*, *chancery* cannot inquire into the inconveniency, only whether there has been any thing improper in executing the writ, or in the appeal. *Ibid.*]

[And in such cases, *chancery* judges according to the rules of law. *Ibid.*]

ADUL

A D U L T E R Y.

Vide Leet, (L. 4.)

A D V O W S O N.

(A) Advowson.

ADVOWSON imports the right of patronage of a church. *Co. Lit. 17. b. 119. b.*

The right to an advowson commenced originally by the foundation, endowment, or donation of the soil of a church; the founder or donor was the patron. *Co. Lit. 17. b. 119. b. Seld. of Tithes 85. * Vid. 2 Wils. 183. et seq. **

If a manor extends to divers parishes, several advowsons may be appendant to the same manor.

If there are two patrons of the same church, the one shall have the advowson of a moiety of the church, and the other the advowson of the other moiety. *Co. Lit. 17. b. 18. a. Vide in Pleader, (3 L. 2.)*

So one may have the nomination, and another the presentation to the same church. *Mo. 894. 2 Rol. 342. l. 25. Dal. 48.*

But the nomination is the substance of the advowson, and the presenter has only a ministerial interest. *Mo. 894.*

Yet he, who has the presentation, is the person who ought to grant an annuity, for that is in the right. *Dal. 48.*

(B) When it shall be Appendant, or in Gross.

AN advowson may be appendant to a manor, or in gross. *Vide Appendant and Appurtenant, (B. 1.)*

Appendant to a manor is, when it has always passed by a grant of the manor *cum pertinentiis*. *33 H. 6. 4. b.*

So it may be appendant to so many acres of land. *Semb. Dy. 24. b. Or to one acre. 1 Rol. 231. l. 20. ad 50. 33 H. 6. 3. a.*

A church in one county may be appendant to a manor in another. *33 H. 6. 4. b.*

So an advowson of a vicarage may be appendant to a rectory. *Dy. 350. b. And so it shall be of common right. Mo. 894. Vide Esplife, (H. 2.)*

But it may also be appendant to a manor. *R. Mo. 894. Ld. Raym. 200. **

So an advowson may be appendant for a moiety, or a part, and in gross for another part. *Dy. 78. b.*

So it may be appendant for one turn, and in gross for the other. *Co. Lit. 122. a.*

If an advowson appendant, and another in gross, are united, it will be appendant for one turn, in gross for the other. *Dy. 259. b.*

So, if parceners make partition of a manor, to which an advowson is appendant, without saying any thing of the advowson, it will be appendant to the part of each parcener in her turn. *Co. Lit. 122. a. 1 Rol. 231. l. 42.*

So, if the patron of a church appendant grant by fine, &c. that the conusee shall present every other turn; that will be in gross for the turn of the grantee, appendant for the turn of the grantor. *Dy. 259. b. 1 Rol. 232. l. 25.*

But if a man having a manor, with an advowson appendant, grant the manor, excepting the advowson, it will be in gross. *Dy. 103. b.*

So, if parceners make partition of a manor, and except the advowson, they have it in co-parcenary in gross. *Co. Lit. 122. a. * Ld. Raym. 198. **

So, if a man grant the advowson, without the manor, it becomes in gross. *Perk. Grant. f. 104.*

So, if he grant one acre of the manor, and by the same deed grant the advowson. *Per Shelly, Dy. 48. b.*

If there are three jointenants of a manor with an advowson appendant, and one of them releases the advowson to another, he has the third part in gross. *33 H. 6. 4. b.*

So, if there be an usurpation upon a common person by a presentation to a church appendant, it becomes in gross 'till recovery. *Semb. 3 Leo. 18. Hob. 140.*

Otherwise in the case of the king. *R. 3 Leo. 17. Hob. 140.*

If an advowson be in gross, it cannot afterwards by any act be appendant. *D. 1 Leo. 26.* except where the act which made it in gross be totally avoided; as, a recovery after an usurpation. *Hob. 140.*

* As where the reversioner of a manor, to which an advowson is appendant, usurps, then the particular estate determines, the advowson is become appendant again. *Ld. Raym. 302. **

An advowson is appendant to the demesnes, not to the rent, or services of a manor. *Co. Lit. 122. a. Dy. 70. b.*

So, if it was appendant to the manor of *D.* and the manor of *S.* held of it escheats, it will not be appendant to that. *Co. Lit. 122. a.*

So, if there be a capital messuage with lands to it reputed to be a manor, an advowson may be appendant to it. *R. 1 Leo. 207, 8.*

So an advowson of a priory may be appendant to a castle. *1 Rol. 230. l. 10.*

(C. I.) How it shall be granted.

AN advowson is an incorporeal inheritance. *Co. Lit. 17. a.* And therefore, if it be in gross, it passes only by grant by deed, and not by livery. *Co. Lit. 332. a. 335. b.*

So,

So, if there be a feoffment of an acre of a manor to which, &c. with the advowson, it will not be appendant to that acre, unless it be by deed. 1 *Rol.* 231. l. 30. *Dub. Sav.* 104.

But if the advowson be appendant, by the grant of the manor, &c. to which, &c. the advowson passes. 1 *Leo.* 208.

And this, in the case of a common person, if the manor be granted, without saying, *cum pertinentiis*. *Co. Lit.* 307. a.

So, in the case of the king, 'till the *fl. de Prær.* R. 17 *Ed.* 2. 15. *Stamf. Prær.* 42. R. 10 *Co.* 64.

So, after the *fl. de Prær. regis*, if the king made livery to his ward at his full age of his lands, the advowsons appendant, &c. passed to him, without express mention. *Stamf. Prær.* 43. 10 *Co.* 64. b.

So, if the king grant the temporalities to a bishop. *Stamf. Prær.* 43. a. 10 *Co.* 64. b.

Or, render the lands of an idiot to his heir. *Stamf. Prær.* 43. a.

But by the *fl. de Prær. reg.* 17 *Ed.* 2. 15. *si rex dat manerium vel terram cum pertinentiis nisi fecit expressam mentionem in charta de advocacionibus ecclesiarum*, they do not pass. R. *Mo.* 872. *Vide* 10 *Co.* 63. b.

So, if he demise the manor to which, &c. *cum pertinentiis* for years, the advowson does not pass to the lessee. R. *Hob.* 127.

So, if the king has a rectory appropriate, and grants the advowson of *B.* neither the rectory, nor the advowson passes. R. 3 *Leo.* 101. 2 *Rol.* 45. l. 15.

Yet if a manor with an advowson appendant come to the king by purchase, or escheat, and he grants the manor *adeo plene* as such a one had it, the advowson passes. *Stamf. Prær.* 44. a. *D.* 2 *Leo.* 26. 2 *Rol.* 185. l. 30. R. 10 *Co.* 65. *Dy.* 350. b.

So, if the king grant a manor with the advowson, and the church was then void, the present avoidance does not pass. R. *Mo.* 249.

If there be a grant of *all his tenements*, or *all hereditaments* in *D.* the advowson of *D.* passes, though it be not particularly named. *Hob.* 304. *Dy.* 323. b. 350. b. 2 *Rol.* 185. l. 30.

Or, *his lands and tenements*. *Perk. Grant*, f. 116.

[But if a man seised in fee devises his lands, tenements, &c. in *A.* to trustees, to apply the rents to certain charitable uses, and dies, and the church of *A.* becomes void, of which he had the advowson, the heir at law shall present. *Kensley v. Langham*, *M.* 9 *G.* 2. *C. T. T.* 143.]

[It will not pass by the word *lands*, but it will by *hereditaments*. *Savil v. Savil*, *T.* 10 *G.* 2. *Fort.* 351. *Westfaling v. Westfaling*, *H.* 1746. 3 *Atkins* 460.]

So, if a man, who has an advowson, grant *ecclesiam suam* de *D.* the advowson passes. 1 *Leo.* 191. *Co. Lit.* 17. b.

So, if the king grant *ecclesiam suam*. R. 1 *Leo.* 191.

Or, *dispositionem ecclesie*. *Hob.* 152.

If there be a feoffment of a manor, and before attornment, the feoffor grant the advowson by deed, the grant is void; for it passed by the livery. 1 *Leo.* 208.

If the king for a forfeiture seize a manor, or two parts of it, the advowson passes, though it be not named in the inquisition. *R. Hob. 127.*

If there are two moieties of a rectory, both which are appropriate to a religious house, after the dissolution it may be granted as an entire rectory. *R. Jon. 446.*

But by a grant *de vicariâ suâ*, the advowson of the vicarage does not pass. *R. 1 Leo. 191. Cro. El. 163.*

By a grant of several parcels of a prebend to which, &c. *with all commodities, emoluments, and appurtenances*, the advowson appendant to the prebend does not pass. *R. Hob. 303, 4.*

By a grant of so many acres, or a third part of the manor, without express mention of the advowson, no part of the advowson passes. *1 Rol. 232. l. 5, 10.*

So, if a manor with an advowson appendant be granted by deed, and no livery executed, the advowson does not pass. *D. 2 Rol. 91.*

So, if it be granted by bargain and sale, and the deed be not enrolled. *1 Rol. 100.*

[Advowson in gross with one acre of land, may pass by common recovery on a writ of entry *sur disseizin in le poss.* *Bailey v. University of Oxford, P. 33 G. 2. 2 Wilf. 116.*]

(C. 2.) Grant of the next Avoidance.

A man seised of an advowson may grant it in fee, for life, &c. as any other inheritance.

So he may make a grant of the next avoidance only.

Or, the two or three next avoidances successively. *Hob. 322, 323. Co. Lit. 249. a.*

So he may grant several avoidances to several persons. *Vide Hob. 323.*

So he may grant the next avoidance to *A.* and his assigns during the life of *A.*; for a grant may be so restrained, and if no one presents in the life of *A.* or no avoidance happens, the grant determines. *R. 2 Rol. 49. O. R. Cro. Car. 505. Jon. 407.*

So he may grant it to *A. B. et C. vel uni eorum conjunctim et divisim*, and *A.* may present *B.* another of the grantees upon the next avoidance. *R. Bend. pl. 40. Mo. 4. 1 And. 2. 4 Leo. 119.*

So a grant of the next avoidance may be assigned, before the avoidance happens. *2 Rol. 45. l. 35, 37. 47. l. 12.*

So, after an avoidance happened, if the patron grant the next avoidance, though the grantee shall not have the present avoidance, it will be a good grant for the next that happens. *Per two J. Dy. 26. a. R. acc. Mo. 89. But no judgment; Cro. El. 173. Cont. Dy. 283. a. Vide infra.*

If the next avoidance be granted to *A.* and *B.*; before the avoidance *A.* may release to *B.* *R. Cro. El. 600. 173. Mo. 467.*

A grant *de proximâ advocations*, or *proximâ presentatione* is the same. *Dy. 35. b.*

But if a man grant the next avoidance to *A.* and afterwards grant the next avoidance to *B.* the second grant is void; and *B.* shall

shall not have the second avoidance. *C. Lit.* 378. *b.* *R. Cro. El.* 790. *Per. Fitz. and R. acc. Dy.* 35. *a.* in marg. *Semb.* 2 *And.* 174.

So, if a parcener present, and afterwards grant the next avoidance, it will be void; for it belongs to the other parcener. *Semb. Dy.* 35. *a.*

If a man grant the next avoidance to *A.* and by deed subsequent grant the next avoidance to the same person, it will be a surrender of the first. *Dy.* 35. *a.* in marg.

So, if an abbot and convent grant the next avoidance of a church appropriate, it is void. *R. Sav.* 20.

So, if the grantee of the next avoidance be defeated of it, he shall not present upon a subsequent avoidance: as, if to the next avoidance the presentment be by the king, or bishop upon a lapse.

Or another presents by usurpation.

So, if the avoidance happens by the incumbent's being created a bishop, and the king presents by his prerogative. *R.* 2 *Cro.* 691.

Or, if the king grant to the incumbent to hold it in *commendam.* *R.* 2 *Cro.* 691.

So, if the next avoidance be evicted by an elder title; as by flat. &c. *Ibid.*

Or, the grant be of the third avoidance, and it be used by the wife for her dower. *Cont. Co. Lit.* 379. *a.* *Acc.* 2 *Cro.* 691.

So, if the grantee present by simony; though the flat. *Eliz.* makes such a presentation void. *Hob.* 168.

Yet, if a man grant the three next avoidances *successive*, and upon the first avoidance the grantor himself presents, the grantee is not ousted, but may present upon the subsequent avoidances. *Co. Lit.* 249. *a.* *Cont. per three J. but Hutt. acc.* *Jon.* 6. *Hob.* 322.

So, if *A.* usurps upon the grantee of the next avoidance, who brings a *quare impedit*, and *pendente lite* the clerk of *A.* resigns, the grantee after judgment for him shall have the subsequent avoidance. *R.* 21 *H.* 7. 8. *a.*

But an avoidance cannot be granted by a common person, after it is fallen. *R. Mo.* 89. *Dy.* 129. *b.* 26. *a.* 283. *a.* * *Vid.* 2 *Wilf.* 197. *

* And a grant of the *advowson* made after the church is actually fallen *vacant* is equally void. And the reason of this is not, as is said in the old books, because it is a chose in action, but because such grants might encourage simony. 2 *Burr.* 1510, 1511. *

If the grant of the next avoidance be to two, and the one releases to the other, after the avoidance happens, it is not good. *Semb. Mo.* 467. *Dy.* 26. *a.* in marg. *R.* 1 *Leo.* 167. *Cro. El.* 173. 600. *Osw.* 85.

So, if the grantee assign, after avoidance. 2 *Rol.* 45. *l.* 37. 47. *l.* 12.

Yet the king, by his prerogative, after avoidance may grant the presentation. 3 *Leo.* 196. *Dy.* 283. *a.*

But this ought to be by special, and express words. *Hob.* 140.

For

For if the king, after an avoidance, grant the manor with the advowson appendant, the grantee shall not have the presentation. *R. 3 Leo. 196. Dy. 300. a. 2 Rol. 19. l. 15, 20.*

So, if a man seised of the advowson of a church, of which he is likewise incumbent, devises the next presentation to his executor, it is good; though it does not take effect 'till the avoidance happens. *R. 2 Cro. 371.*

So by the *st. 12 Ann. 12.* if any for money, reward, promise, &c. directly or indirectly take, procure, or accept a grant of the next avoidance in his own or another's name, and be presented, collated, instituted, and inducted to any such ecclesiastical living, &c. it shall be void, and the queen may present as on a simoniacal contract.

(D) Appropriation of an Advowson.

(D. 1.) To whom it may be.

THE appropriation of an advowson was, when the church, with the tithes, glebe, &c. was appropriated to the perpetual use of some corporation religious, or ecclesiastical. *Vide Ken. Imp. 25, &c.*

And regularly, it ought to be made to a corporation spiritual, which performs divine service, &c. *Pl. Com. 496. b.*

But sometimes it was made to a dean and chapter. *Pl. Com. 497. a. 1 Rol. 238. l. 47. Ken. 34. 2 Cro. 518.*

To a nunnery, &c. who supplied the cure by a vicar. *Pl. Com. 497. a.*

To a bishop, chantery, &c. *1 Rol. 238. l. 44. 239. l. 45. 240. l. 5.*

So it might be to two priories, or religious houses. *R. 1 Rol. 238. l. 50.*

To a college. *2 Cro. 518.*

So, if there be a vicar endowed upon the appropriation, the vicarage may be restored and reunited to an house of religion, and the cure shall be served by one of the house, or any one provided by them. *R. Ley 14.*

And since the dissolution of the house by the *st. 31 H. 8.* the king and his patentee shall have the rectory and vicarage; and a presentation by the king after a grant to the patentee, and institution and induction to the vicarage thereon are void. *Ibid.*

(D. 2.) Of what Effect it shall be.

Sometimes the appropriation gave the right of patronage, as well as the church, glebe, and tithes; and sometimes the patronage was reserved. *Seld. of Tithes 98. Vide Lind. 157. c. de Loc. verb. Ligari.*

But regularly, every thing was given, and the house of religion was *quasi* perpetual incumbent. *Pl. Com. 497. a. 500. b.*

Which

Which could not assign the appropriation to any other body spiritual. *Seld. of Tithes* 97. *Pl. Com.* 497. a.

And usually supplied the cure by monks, &c. of their house. *Vide Ken. Imp.* 25.

Or, by vicars deputed. *Pl. Com.* 497. a.

And now by the *st.* 15 *R.* 2. 6. on every appropriation, the ordinary shall take care to have a competent sum allotted, out of the church appropriated, to the poor of the parish, and that the vicarage shall be endowed.

And by the *st.* 4 *H.* 4. 12. there shall be a perpetual vicar instituted and inducted, who shall be sufficiently endowed.

And therefore, an appropriation without endowment of a vicar was void. *Dub.* 2 *Cro.* 252.

And the king's licence shall be void, unless it be upon condition, that the vicarage shall be endowed. *R. Sti.* 156.

But the endowment need not be by the same instrument with the appropriation, if it be at the same time. *Ibid.*

But now all appropriations, which come to lay hands shall be intended to be made with all necessary circumstances; for the *st.* 27 *H.* 8. saves no right, except of those then alive. *R.* 2 *Cro.* 252, 517.

And the restitution of a vicarage to a rectory appropriated before the *st.* 15 *R.* 2. 6. made after the *st.* 4 *H.* 4. 12. is good, though then there will be no vicar endowed; for that is not an appropriation pursuant to the *st.* 4 *H.* 4. *R. Ley.* 14.

[The appropriation may give the right of patronage; as if a religious house was seised in fee of a rectory and church, and held them as parsons without presentation or admission, and on dissolution it comes to the crown, who grants to a company who enjoy it without presentation; on union after the fire of London, by 22 *Car.* 2. c. 11. f. 48. which directs, that churches so united, shall be presented to, by their several and respective patrons by turns,* this being united, the company shall have its turn in presenting. *Bishop of London v. Mercers' Company*, *H.* 5 *G.* 2. *Str.* 925.]

(D. 3.) By whom it shall be made.

Appropriations at first were by the patron alone. *Seld. of Tithes.*

But now they cannot be made without the patron, and ordinary, and the assent of the incumbent, where the church is full, and the king's licence. *Pl. Com.* 497. b. 1 *Rol.* 238. l. 15, &c. 2 *Cro.* 517.

Or, if the patron be abbot, &c. of the same house, by the ordinary, and king. 1 *Rol.* 238. l. 10.

And they may be made, when the church is full, though it be more proper, when it is void. *R. Pl. Com.* 499. b. 1 *Rol.* 239. D.

So they may be made by the inferior, or superior ordinary, with the patron; and therefore, an appropriation by the pope without the bishop, (for he was superior ordinary) and now since the

the *ſt.* 25 *H.* 8. by the king, is ſufficient. *R. Pl. Com.* 498. *a. Sti.* 156.

The king's licence need not mention, that the church is full. *R. 1 Rol.* 239. *l.* 40.

And ſhall be good, though there be a new preſentation after the licence before appropriation. *R. 1 Rol.* 239. *l.* 50.

Though in the licence there be a ſmall miſnomer of the body politic; if it be known by both names. *R. 1 Rol.* 240. *l.* 5.

But the king's licence muſt be by matter of record, and with a condition, that the vicar be endowed. *R. Sti.* 156.

(D. 4.) How diſappropriated.

But the advowſon will be diſappropriated, if the body to which, &c. be diſſolved. *Pl. Com.* 501. *a. Jon.* 3.

So now, if a preſentation be made to the church; for thereby it becomes preſentable for ever. *Pl. Com.* 501. *1 Rol.* 240. *l.* 20, 50.

If the advowſon be recovered in a writ of right. *1 Rol.* 240. *l.* 40.

But a preſentation by uſurpation, and inſtitution and induction thereon, do not diſappropriate. *Pl. Com.* 501. *a.*

Nor, a grant of the advowſon by the king, where he has a rectory appropriate. *R. 3 Leo.* 101.

Nor, by the abbot and convent, to which it was appropriated. *Dub. Sav.* 30.

(E) Impro priation.

SO now by the *ſt.* 27 *H.* 8. 28. and 31 *H.* 8. 13. an advowſon may be impropriated to lay perſons.

For by the *ſt.* 27 *H.* 8. 28. which diſſolves the monaſteries and other religious houſes under the value of 200*l.* *per ann.* with all tithes, churches, chapels, &c. appertaining; and by the *ſt.* 31 *H.* 8. 13. which diſſolves the greater monaſteries, &c. any perſon or perſons and bodies politic may enjoy the ſame by letters patent, &c. *Jon.* 2.

And that, which was an appropriation in the hands of religious perſons, is uſually called an impropriation in the hands of a lay perſon. *Bl. Nom. Impr.*

By theſe ſtatutes, and other ſubſequent, rectories, tithes, &c. impropriate come to the hands of lay perſons are temporal inheritances. *Co. Lit.* 159. *a. Jon.* 3.

By the *ſt.* 32 *H.* 8. 7. any diſſeiſed, or wronged of them, &c. may have remedy for them in the king's temporal courts, by *preſcipe quod reddat*, aſſiſe of *novel diſſeiſin*, *mort d'anceſtor*, *quod ei deſorceat*, writ of *dower*, or other writ original. *Vide Diſmiſs.* (M. 18.)

So by the ſame ſtatute, fines and all other aſſurances may be had and made of them.

And

And therefore, every real action now lies for a rectory, or tithes impropriate.

So, an ejectment. *R. Cro. Car.* 301. *Jon.* 322.

So, an indictment for a forcible entry, or detainer. *R. Cro. Car.* 201.

So there may be a fine, or common recovery of a rectory impropriate, tithes, &c. *Vide Difmes*, (N.)

So by *ſt.* 32 *H.* 8. 7. an impropiator may sue in the ecclesiastical court. *Vide Difmes*, (M. 2.)

And by the *ſt.* 2 & 3 *Ed.* 6. 13. may have debt for the treble value on subtraction, &c. *Vide 2 Infl.* 612. *Vide Difmes*, (M. 2.)

But since the reformation, several attempts have been made for the restitution of impropriations to the church. *Ken. Imp.* 124, &c.

(F) Union.

(F. 1.) By whom it shall be.

SO if two churches are of little value, not able to support the charges, they may be united and consolidated by the assent of the ordinary, the patrons, and the king's licence. *Bro. Appropriation* 1. *R.* 2 *Rol.* 778. l. 32. *R. Mo.* 408, 661. *Cro. El.* 500.

So in the vacancy of the churches, they may be united by the ordinary, with the assent of the patrons; and it is sufficient, if it be afterwards confirmed by the king. 2 *Rol.* 778. l. 45.

[On *ſt.* 10 *C.* for uniting livings in *Ireland*, it was resolved they could not be united during vacancy. *Rex v. Archbishop of Armagh*, *P.* 8 *G. Str.* 516.]

And, though the ordinary be the principal, it is not material who begins the union, the bishop, patron, or king. 2 *Rol.* 778. l. 50.

So they may be united by the ordinary, with the assent of the patrons, without the king's assent, as it seems. *Bro. Appropriation* 1. 2 *Rol.* 778. l. 36. Where the church was poor, and insufficient for the maintenance of an incumbent. *Cro. El.* 500. 1.

And now by the *ſt.* 37 *H.* 8. 21. union of two churches, or of a church and chapel, not a mile distant, and one not above 6l. *per annum* in the king's books, may be made to continue for ever by the ordinary with the assent of the incumbents, and of him that hath right, &c. to the patronage, being of full age.

Provided, not to be in cities, or corporate towns, without the assent of the corporation under seal.

And if the inhabitants settle 8l. *per annum* for ever on such poor benefice, within a year, the union shall be avoided.

And all unions before made are confirmed.

And since this statute, an union may be made of churches of greater value than are mentioned in the *ſt.* 37 *H.* 8. 21. as well as by the common law. *R. Cro. El.* 501.

But if an union be made upon false suggestions, it will be void. *R.* 2 *Rol.* 778. l. 15.

So

So an union cannot be made of parishes, but only of churches. *R. 1 Sal. 165. Skin. 616.*

So, if the patron of *A.* purchase the church of *B.* and for 200 years afterwards present to the church of *A.* with the chapel of *B.* this does not make an union of the churches, but the king may present to *B.* by lapse. *R. Sav. 17.*

So, by the *st. 17 Car. 2. 3.* the ordinary, with the consent of the mayor, aldermen, and justices of peace, or other chief officer, or the major part of them, and of the patrons, may unite two churches, or chapels, or a church and a chapel, which lie convenient in any city or town corporate, and appoint which church shall be united to the other, at which church the inhabitants shall meet for divine service, and which shall be presentative: provided the union be void, if not registered with the bishop of the diocese, or if the churches united exceed 1000 *per annum* above-reprizes, unless desired by the major part of the parishioners under their hands.

(F. 2.) The Effect of an Union.

By the union of two churches, they are consolidated and made one.

And the patron may present by the name of the church in *A.* without distinction of the one or the other. *Dy. 259. b.*

But by the union it may be directed, that the church shall be extinct. *Sho. 209.*

And by the *st. 22 Car. 2. 11. f. 69.* the incumbents of the churches thereby united shall not be deprived of the tithes of their own church, so long as they serve the cure of the united church.

And by the *st. 22 & 23 Car. 2. 15.* by which tithes are changed to an annual sum, *f. 13.* the surviving incumbent of the parish united shall have like remedy, &c. as if presented to both parishes since the union.

Yet he shall have remedy only for his proportion, in respect of the parish of which he was incumbent before. *R. 3 Lev. 96.*

And this clause extends only, where the other incumbent died after the fire of *London*, and before the *st. 22 & 23 Car. 2.* *R. 2 Jon. 160. 3 Lev. 96.*

So by the *st. 17 Car. 2. 3.* and *22 Car. 2. 11. f. 68.* it is enacted, that the parishes thereby united, as to all rates, taxes, parochial rites, charges and duties, &c. shall remain distinct.

And that the patrons of each parish united shall present by turns, the patron of the church of best value to have the first turn.

And therefore, a patron-subject of a benefice greater in value shall have his turn before the king, patron of the lesser church. *Sho. 208.*

So the impropriator of a rectory, who names the curate to the church, shall be the patron, after the union of the church with another parish. *Dub. F. g. 169, 250. *Acc. Str. 925.**

So by the common law, the union of churches does not extinguish the tithes, or a *modus* for them. 1 *Sal.* 165.

So, since the *ft.* 22 *Car.* 2. 11. both parishes shall be contributory to the repair of the church made the parish church. *R. Skin.* 616.

Right of Adowson.

Vide Difmes, (M. 10.)—*Quare Impedit*, (B. 1.)

Title to Adowson.

Vide Pleader, (3 I. 4.)—*Prohibition*, (F. 3.)

A F F E E R M E N T.

Vide Leet, (O. 2.)

A F F I D A V I T.

Vide Serement.

A F F I R M A T I V E A N D N E G A T I V E.

Vide Pleader, (R. 3.)

A G E.

Vide Baron and Feme, (B. 5.)—*Dower*, (A. 3.)—*Enfant*, (C. 9, 10, 11.—D. 3.)—*Pleader*, (2 G. 3.—2 W. 22.—2 Y. 8.)

A G I S T M E N T.

Vide Chase, (O. 1.—Q. 6.)—*Difmes*, (H. 5.)

A G R E E M E N T.

(A. 1.) **What shall be so called.**

An agreement is *aggregatio mentium*, viz. when two or more minds are united in a thing done, or to be done. *Pl.*

17. a. A mutual assent to do a thing. *Pl. Com.* 5. a. 6. a.

And it ought to be so certain and complete, that each party

have an action upon it. *Pl. Com.* 5. a.

And

And there are three sorts of agreements: an agreement executed, an assent subsequent to a thing done, and an agreement executory. *Pl. Com. 8. b. 9. a.*

(A. 2.) Executed.

An agreement executed often amounts to a bargain and sale; *de quo vide in bargain and sale, (A.)*

So, when an assent subsequent is given to an act precedent, by such assent the agreement is executed. *Pl. Com. 8. b.*

(A. 3.) Executory.

An agreement executory is, when the thing agreed is to be done afterwards. *Pl. Com. 9. a.*

As, if a man agree to pay so much for such goods, at such a day.

So, if a man agree to do such a thing upon a condition or contingency.

As, if he sell corn to another, if it pleases him upon view. *Pl. Com. 6. b.*

If he agree with a collector to pay so much for a subsidy, and upon weighing of the goods shall appear due. *R. Pl. Com. 6.*

(A. 4.)
When an
agreement
executory
shall be
compleat.

Where an agreement is conditional, it shall not be compleat 'till the condition performed: as, if a man sell goods for so much as *A.* shall name, the contract is not compleat 'till *A.* names the price. *Kit. 181. a.*

If the condition be, *if he like the corn or goods upon view*, when he first has seen them, and agreed or disagreed, approved or disapproved of the goods, the bargain is compleat, or void; though he afterwards disagree, or agree to the contrary. *Bro. Contract 2. 1 Rol. 449. l. 22.*

Otherwise, if it be, *if he like or dislike at such a day*, if he declare his liking or dislike before, he may alter it at the day. *1 Rol. 449. l. 25.*

But by an agreement executory the interest of the goods is bound before the completion of the contract: as, if a man sell goods for so much as *A.* shall name, though it is no contract 'till *A.* names the price, yet if the vendor sell the goods to another before *A.* names the price, if *A.* afterwards name it, an act upon the case lies. *Kit. 181. a.*

So if the goods are marked, or have the seal of the purchaser, the property is vested in him immediately. *R. Skin. 647.*

(B) How it shall be made.

(B. 1.) By what Words.

TO an agreement, or contract, there is not any prescribed form of words, but such words as shew the assent of the parties are sufficient. *Pl. Com. 140. b.*

And therefore it is not material, by which of the parties the words are spoken, if the assent of the other appears. *Pl. Com.* 140.

141.
If a bill of parcels be given in this form, *bought by A. of B. 10 pieces of muslin at 10 shillings per piece, to be paid for as taken away*, this will be a good agreement for them; and *A.* shall have an *assumpsit*, if *B.* refuses to deliver them, and *B.* if *A.* does not take them away within a reasonable time. *R. Skin.* 647.

But an agreement must be certain and compleat. *Pl. Com.* 5. a.

(B. 2.) Upon what Consideration.

Every contract, or agreement obligatory, ought to have *quid pro quo*. *Co. Lit.* 47. b. *Dy.* 336. b.

And therefore, if an agreement be made to do a thing without any consideration for it, it is *nudum pactum unde non oritur actio*. *Pl. Com.* 308. b.

What will be a good consideration, *vide action upon the case upon assumpsit*, (B. 1, &c.)

But where an agreement or contract is in writing, the consideration is not inquireable; for it shall be intended to be executed upon good consideration. *Pl. Com.* 308. b. 309. a.

So, if a bargain and sale of goods be pleaded, the consideration need not be alledged; for it shall be intended. *R. Dy.* 90. b. in marg. *Vide in bargain and sale*, (B. 11, 12.)

Or, if it be found by verdict. *R. Dy.* 90. b. in marg.

(B. 3.) When the Consideration shall be paid immediately.

If a man agree for goods at such a price, the bargain shall be void, if the money be not paid immediately. *Dy.* 30. a. *Hob.* 41. *Bro. Contract* 25. 14 H. 8. 19. a.

For in every bargain, payment ought to be made upon the delivery of the goods, except where a future day is agreed for the payment. *Bro. Contract* 25, 26. *Hob.* 41, 2. *Kit.* 181. b.

Though earnest be given upon the bargain; for that only makes the contract compleat. *Per Holt*, 1 Sal. 113.

Yet, if the party deliver the goods, without payment, or a day appointed for payment, that is sufficient to make the bargain good. *Bro. Contract* 35. *Per Mordant*, 10 H. 7. 8. a.

So, if a sale be of goods for such a price without payment, or mention of payment, it will be good; for if the vendee afterwards pay, it shall have relation to the first agreement. *R.* 10 H. 7. 7. b. It seems, that the goods were delivered.

So, if the agreement be for such a price, and the vendee pays part as earnest, the contract is perfected. *Kit.* 181. a. *Per Brudenell*, 14 H. 8. 22.

Or, if the vendee immediately tell the money for payment, the vendor cannot, in the mean time before the money is told, sell to another. *Kit.* 181. a. *Per Brook*, 14 H. 8. 20. a. *Vide ante* (A. 4.)

So,

So, if a sale be of goods for such a price, and a day of payment limited; the contract will be good, and the property altered by the sale, though the money be not paid. *R. 10 H. 7. 8. a. 14 H. 8. 20. a. Dy. 30. a.*

So, if a contract be made, and earnest paid, the vendor cannot afterwards sell to another, without a request to the vendee to take away the goods, and staying a convenient time after request. *Per Holt, 1 Sal. 113.*

So, if *A.* by letter desire *B.* to send him goods by *C.* receiving the money for them, if *B.* sends them without receiving the money, he shall not afterwards charge *A.* for the money; for it was a conditional bargain, and the folly of *B.* to send the goods before payment. *R. 4 Leo. 7.*

So a contract for a thing, of which *A.* the contractor has only a possibility, will be void; as, if *A.* seised in fee lease by *parol* for four years, and the same day lease to *B.* for the same term, the second lease is void. *Vide in estates, (G. 13.) Vide Pl. Com. 432. a.*

If *A.* sell an horse to *B.* upon condition, that he pay 20*l.* at *Christmas*, and afterwards sell it to *D.* the sale to *D.* is void, though *B.* afterwards do not pay. *Pl. Com. 432. b.*

(B. 4.) When there shall be a Writing of it.

By the *st. 29 Car. 2. 3.* no contract for sale of goods for 10*l.* or upwards shall be good, except the buyer accept, and actually receive part of the goods sold, or give earnest to bind the bargain, or in part of payment, or some memorandum in writing of the bargain be signed by the parties to be charged by such contract, or their agents thereto lawfully authorized.

[Executory contracts for goods (as a chariot) to be made, and not within 29 *C. 2. c. 3.* *Towers v. Osborne, H. 8 G. Str. 506.*]

[Nor for corn, then unthrashed, to be delivered in three or four weeks, and paid for on delivery. *Clayton v. Andrews, 7 G. 3. 4 B. M. 2101.*]

(C.) How Expounded.

AN agreement, or contract, shall have a reasonable construction according to the intent of the parties: as, if a man agree with *B.* for 20 barrels of ale, he shall not have the barrels after the ale is spent. *7 H. 8. 27. b. Bro. Contrab 4.*

For more of title, *Agreement. Vide Baron and Feme, (S. &c.)—Chancery, (2 C. 1, &c.—4 S. 1, &c.)—Parceners, (C. 5)—Pleader, (C. 53, 54, 55.)*

A I D E.

(A) Aides pur faire Fitz Chivaler, et File marrier.

A ID pur faire Fitz Chivaler, and aid pur file marrier, are due by the common law as incident to knight's service, when the lord makes his eldest son a knight, or marries his eldest daughter. *F. N. B. 82. D. Co. Lit. 76. a. Fl. l. 3. c. 14. f. 9.*

By the common law, this aid ought to be reasonable, but was uncertain. *Co. L. 76. a.*

But by the *st. W. 1. 3 Ed. 1. 36.* it was ascertained, that of every knight's fee should be paid but 20s. nor more of 20l. per annum in socage; and it was provided also, that it should not be levied to make his son a knight, 'till he was fifteen years old, nor to marry his daughter 'till she was seven years old.

And a tenant who holds by half a knight's fee, or 10l. per annum in socage shall pay only 10s.; *et sic pro ratâ. F. N. B. 82. C.*

And the king's tenant shall pay in the same manner, as the tenant of a common person. *F. N. B. 82. F.* and that by the *st. 25 Ed. 3. 11.*

If the eldest son, or daughter, die before the age in which the aid shall be levied, it shall be levied for the next son or daughter, when they attain the age aforesaid; for they are eldest at the time, though the writ says, *primogenit'*. *F. N. B. 82. G.*

And the lord may distrain for this aid. *F. N. B. 82. D.*

Or, have a writ to levy it. *F. N. B. 82. A.*

And if the sheriff does not execute the writ, he shall have an *alias pluries*, and attachment. *F. N. B. 82. E.*

And the writ ought to mention the age of the son or daughter; though that be not mentioned in the register. *F. N. B. 82. H. Reg. 87.*

And by the *st. W. 1. 36.* if the father die before the aid paid, and after levying thereof, debt lies against the executors of the father; and if the executors want assets, debt lies by the daughter against his heir. *F. N. B. 82. F.*

But if the daughter be married, though the aid be levied and not paid, she cannot have debt. *F. N. B. 83. B. Vide 2 Inst. 234.*

But tenant by grant, or petit serjeantry shall not pay this aid. *F. N. B. 83. A.*

And by the *st. 12 Car. 2. 24.* Aid pur faire firs chivaler, et file marrier is taken away.

Vide Prerogative, (D. 40.)

(B.) Aide

(B) Aide Prier.

(B. 1.) Of the King.

(B. 1.)
When it
shall be.

SO, if a man be impleaded, and cannot make a defence without the aid of some other, he may pray in aid of the king, or of a common person.

And therefore, in all cases where tenant for life, or for years, or a farmer who renders a fee-farm to the king is impleaded, he may demand aid of the king. 1 *Rol.* 206. *Vide* 1 *Rol.* 151. l. 42.

Though the reversion come to the king by grant, escheat, forfeiture, &c. 1 *Rol.* 152. l. 1.

So, if a tenant in fee by grant of the king, be impleaded for his inheritance. 1 *Rol.* 148. l. 32, 151. l. 45, 50.

Or, any one who ought to have a recompence in value against the king. 1 *Rol.* 149. l. 47.

And this by the *st. de bigamis*, 4 *Ed.* 1. 1. if there are words which will bind a common person to warranty, though the king is not bound by them to warranty. 2 *Inst.* 269.

So tenant in tail after possibility, &c. shall have aid of the king. 1 *Rol.* 152. l. 17.

So, tenant at will, or by copy by grant of the king. 1 *Rol.* 152. l. 12, 15.

So, the king's grantee, or committee of a ward. 1 *Rol.* 152. l. 25, *ad* 40.

So an assignee of the estate of the grantee of the king, or farmer. 1 *Rol.* 154. l. 25.

Aid of the king shall be granted in all actions, where the king may have prejudice: as, in all real actions, where the title of the king appears to be concerned.

So, in personal actions, where the interest of the king may be concerned: as in ejectment against the king's lessee. *R.* 1 *Rol.* 148. l. 45.

So, in trespass *quare clausum fregit*; for by intendment the freehold is the cause of action. 1 *Rol.* 148. l. 15.

In *replevin*. 1 *Rol.* 148. l. 32.

So, in an action upon the cause against the king's farmer of a leet, to hold the leet. 1 *Rol.* 148. l. 22, 150. l. 5.

So, in debt, or other personal action against an officer, who makes a contract by force of his office to the use of the king. 1 *Rol.* 155. l. 17, *ad* 40.

So aid of the king shall be allowed, though the land itself is not demanded, but a thing collateral: as rent, common, &c. issuing out of the land of the king's lessee, or farmer. 1 *Rol.* 149. l. 15, *ad* 25.

So, though the tenant claims a less interest than the writ supposes and he shall not be estopped by the supposal of the writ: as in *dum fuit infra etatem*, if the tenant claims only a lease for years by the king's patent, though he has accepted the writ which supposes him tenant of the freehold, to be good. 1 *Rol.* 149. l. 5.

So aid shall be allowed, though the suit be by the king himself : as, in trespass by the king for taking toll of his tenants, who are toll free, if the defendant justifies as farmer of the king. 1 *Rol.* 149. l. 32.

So, if aid of the king be prayed for a cause which is disallowed as insufficient, the defendant may afterwards pray aid in the same term upon another cause. 3 *H.* 6. 5. b. 1 *Rol.* 158. l. 20.

Aid of the king ought to be before issue ; for the king shall not maintain an issue taken by the party. 1 *Rol.* 157. l. 32, ad 50.

And may be before plea. 1 *Rol.* 157. l. 35.

Yet it may be before, or after issue, in the case of the king. *Hard.* 179.

So, where aid is not prayed when it was grantable, the defendant may have a writ *de non procedendo rege inconsulto*. *Hard.* 427. (B. 2.) Writ *de non*

But the writ *de rege inconsulto* ought to shew the king's title, *procedendo rege inconsulto*, otherwise it will be void. *Hard.* 431.

So it ought to be founded upon an inquisition, which finds the king's title. *Ibid.*

So it ought to recite the record, depending in the court to which it is directed, truly. *Ibid.*

But aid of the king shall not be granted, where the cause of action is older than the cause of the aid *prier* of the king : as, in trespass, where the defendant intitles the king to the ward of the land by office after the trespass supposed. 1 *Rol.* 149. l. 50, 52. (B. 3.) When it shall not be allowed.

So, where the cause of action accrues by an action of the defendant subsequent to the king's grant : as, if the king's tenant, or farmer, be sued upon his own grant, made after the grant to him by the king. 1 *Rol.* 149. l. 12.

In a *quare impedit* ; for the defendant is sued for his own disturbance. 1 *Rol.* 148. l. 35.

So aid shall not be allowed, where the title, or interest of the king cannot come in question : as, in trespass against a tenant in fee by the king's grant. 1 *Rol.* 148. l. 10.

In trespass for goods, battery, false imprisonment, &c. 1 *Rol.* 148. l. 20.

In *trover* for taking of goods, or other transitory action. *R. Mo.* 572. *Cro. El.* 694. 5 *Co.* 109, 111.

So, if it appears, that the king has no title : as, if the defendant justifies for waife as bailiff to the king, and it does not appear, that the goods are waifes. 5 *Co.* 109. 1 *Rol.* 150. l. 35.

If the defendant justifies by a grant to the king, which is a void grant. *R.* 1 *Rol.* 150. l. 15, 20.

Or, by a grant insufficient, or contrary to law. 2 *Infl.* 269.

So by the *st. de bigamis* 4 *Ed.* 1. 2. if the defendant has a confirmation, or release, &c. of the king, which is void. 2 *Infl.* 270.

So, if both claim by the king, and it appears that the plaintiff's demand is void, the defendant shall not have aid. 1 *Rol.* 150. *F.*

Or, that his demand is more beneficial to the king. 1 *Rol.* 151. *G.*

Or, that the king's title cannot be prejudiced. *Hard. 428.*
9. as, in an assise for land in *com. A.* where the tenant pleads
that the land lies in *com. B.* and was granted to him by the king.
1 *Rol. 148. l. 50.*

So aid shall not be allowed, if the defendant is not privy in
estate to the king, as, if he claim by one, who had the land be-
fore it came to the crown. 1 *Rol. 153. K.*

Or, as bailiff, or servant, &c. to the grantee of the king.
Ibid.

So aid lies not, where the tenant comes into court for another
purpose: as, in error by one outlawed for felony upon a *scire*
facias against terre-tenants, if one of them claims by the king's
grant; for he has no day in court, except to hear the record.
1 *Rol. 148. l. 30.*

In error to reverse a judgment; for the land is not directly
concerned. *R. 1 Bul. 218.*

So, it does not lie in a *scire facias* against the king's patentee of
a ward, upon a traverse of an office which entitles the king; for
the king himself is a party, and the patentee may join the king
upon the *scire facias*. 1 *Rol. 149. l. 40.*

So, by the *fl. de bigamis 4 Ed. 1. 3.* it does not lie in dower
against the guardian, or committee of a ward by the king.
2 *Inst. 271.*

(B. 4.) Aid of a Common Person.

(B. 4.)
By whom it
shall be
prayed.

So tenant for life, or years, may pray in aid of him in the re-
version or remainder, when the title of the inheritance is in
question. 1 *Rol. 161. a.*

So, tenant at will. 1 *Rol. 161. l. 21. 167. l. 32. 169. l. 40.*

So, if a defendant justifies as bailiff, or servant, he shall have
aid of his master, where his title comes in question. 1 *Rol. 161.*
l. 19. 171. l. 14.

So, tenant in dower, or by the curtesy. 1 *Rol. 161. l. 25. 40.*
167. l. 48, 53. 168. l. 1.

Lessee for life, or years, &c. shall have aid of him in the re-
mainder in tail. 1 *Rol. 167. l. 22. 174. l. 13.*

If the remainder be to *A.* for life, or in tail, remainder to *B.*
in fee, he shall have aid of both; for both remainders begin to-
gether, and depend upon one estate. 1 *Rol. 174. l. 4, 8.*

But, if the remainder in fee, or in tail, be to the lessee,
he shall not have aid of himself, but of the other remainders only.
1 *Rol. 174. l. 20, 23.*

So, if the lord *paramount* avow upon the tenant *paravail*,
his very tenant, he shall have aid of the *mesne*. 1 *Rol. 167. l. 1.*

If a villein be plaintiff, and the defendant justifies in the right
of the lord, he shall have aid of the lord. 1 *Rol. 173. l. 46.*

So in an avowry upon an husband for rent, homage, &c. of
of land, which he has in right of his wife, the husband shall have
aid of his wife. 1 *Rol. 167. l. 35, 38, 45. 170. l. 7.*

So a parson, prebendary, &c. who has not the fee in him, if he be impleaded in an action, which touches the inheritance of the church, shall have aid of the patron, and ordinary. 1 *Rol.* 175.

l. 30, 37, 39.

Though the patron be demandant, or plaintiff. 1 *Rol.* 172.

l. 40, 46.

Aid ought to be of the patron, and ordinary, though the king be patron. *Noy.* 11.

If there are two patrons, it ought to be of both. *Ibid.*

If a bishop be patron, the parson, prebendary, &c. shall have aid also of the dean and chapter. 1 *Rol.* 180. l. 14.

If parceners, tenants in common, &c. are patrons, he shall have aid of all. 1 *Rol.* 180. l. 22, &c.

So, if parceners enter upon a title ancestrel, or claim by descent, the one shall have aid of the other. 1 *Rol.* 181. l. 46, &c. 182. l. 5, &c.

And this, after partition between them in law, or by construction, as well as upon partition in deed; for otherwise, she cannot have in value *pro rata* if she loses in the action, nor can she deraign a warranty *paramount*. 1 *Rol.* 184. *D. E.*

Aid may be prayed in all actions, where the title to the inheritance comes in question.

As, in all real actions, except in an assise: as, in a *formedon*, writ of entry. *Vide* 1 *Rol. Ab. Tit. Aide.* (B. 5.) In what actions.

So, in ejectment, trespass, &c. where by the pleading it appears, that the title of the inheritance is in dispute. *R.* 1 *Rol.* 161. l. 10, 13, 23.

In *replevin*, where the avowry is upon the title. 11 *H.* 4. 28. b.

And if the defendant avow upon the title, the plaintiff shall have aid before issue joined. 2 *H.* 6. 1. a.

So one shall have aid in a *scire facias* to execute a judgment. 1 *Rol.* 162. l. 35.

In error to reverse a judgment. 1 *Rol.* 162. l. 26.

So, where only rent out of the land is demanded. *R.* 1 *Rol.* 163. B.

Or common, &c. 1 *Rol.* 169. l. 20.

So, though the writ supposes him not capable of aid; for he shall not be ousted of aid by a false supposal. 1 *Rol.* 163. l. 45.

So, in an annuity against a parson, which charges the church, he shall have aid of the patron and ordinary. 1 *Rol.* 177. l. 37.

And in a *scire facias* to execute a judgment against his predecessor. 1 *Rol.* 177. X.

Or, against himself by default, if he did not pray aid before. *Vide* 1 *Rol.* 177. l. 25.

If he be ousted of aid for one cause, he may afterwards have it for another. 1 *Rol.* 185. l. 34.

So, if the defendant has aid of one, and he dies, he shall have aid of the heir. 1 *Rol.* 188. l. 31, 34

If a lessee for life, or years pray aid, the lessor may join without process. 1 *Rol.* 192. l. 12, 30. *R.* 2 *H.* 6. l. a.

The process shall be, a *summons ad auxiliandum*; or, in a *scire facias*, a *scire facias in auxilium*. 1 *Rol.* 193. *R.*

(B. 6.) But one jointenant shall not have aid of his companion. When it shall not be allowed. 1 *Rol.* 167. l. 5.

So tenant in tail shall not have aid of him in the reversion, or remainder in fee; for he himself has an inheritance. 1 *Rol.* 167. l. 16.

Nor, tenant in tail *apres possibility*. 1 *Rol.* 167. l. 18.

So an abbot, bishop, master of an hospital, &c. who have the whole estate in themselves, shall not have aid of the patron and ordinary. 1 *Rol.* 176. l. 8. &c.

Aid shall not be allowed in assise. 1 *Rol.* 161. l. 45.

Nor, in trespass, or ejectment, where, by the pleading, the title of the inheritance does not appear to be in question. *Vide* 1 *Rol.* 161. l. 10, &c.

Nor, in any personal action, where the general issue is pleaded; for then the title is not in question. *Hard.* 179.

Nor, in an action which accrues by the wrong or act of the defendant himself, shall he have aid of him in the reversion, or remainder: as, in intrusion, *rescous*, &c. by the defendant himself. 1 *Rol.* 162. l. 9, 13.

In a *quare impedit*, or *darrien presentment* upon a disturbance by the defendant. 1 *Rol.* 162. l. 20, 24.

Nor, in an action, where the inheritance is not demanded: as, in partition. *R.* 1 *Rol.* 162. l. 45, 48.

Nor, where there is no privity, shall aid be allowed. 1 *Rol.* 191. *O.*

Nor, where there plaintiff claims by the defendant himself. 1 *Rol.* 165. *E.*

Or, under the same title. *Hard.* 179.

So a defendant shall not have aid of another defendant; for it is not necessary, when the other is party to the action. 1 *Rol.* 172. l. 10.

Nor shall he have aid of the plaintiff or demandant; for he may plead any plea against him for his estate. 1 *Rol.* 173. l. 1, 11.

So a defendant shall not have aid, unless it be prayed in the same term, in which he pleads. 1 *Rol.* 185. l. 26. *Hard.* 179.

Though the plea be adjourned to another term. 1 *Rol.* 185. l. 27.

Though the plea was in abatement, and a *respondens* was awarded, he shall not have aid upon his plea in bar.

So, if the plaintiff traverse the cause for which the aid is prayed, it will be a good counterplea of the aid. 1 *Rol.* 185. l. 24.

So, if the issue upon the counterplea of the aid be found for the plaintiff, final judgment shall be for him. *R.* 2 *Leo.* 52.

When defendant may plead in abatement after *aid priu*, *Abatement*, (l. 29.)

AID. (Subsidy.)

Vide Parliament, (H. 9, &c. 13, &c.)—Prerogative, (D. 43, &c.)

A I E L.

Vide Affise, (D.)

A L D E R M A N.

Vide Franchises, (F. 23.)—London, (D.)

A L E.

Affise, and Assay of Ale.

Vide Justices of Peace, (B. 94.)

Ale-Conner.

Vide Lees, (M. 4.)

Alehouses.

Vide Justices of Peace, (B. 25, &c.)

A L I E N.

(A.) Who shall be an Alien.

AN alien is one who is born out of the ligeance of the king.

Lit. seâ. 198. 7 Co. 16. a. Calvin.

If he be born out of the ligeance of the king, he is an alien, though the place of his birth afterwards comes within his ligeance.

Co. 18. b. Calvin.

As, the *antenati* in Scotland, before the union of the kingdoms under King James I. *7 Co. 18. b. Calvin. Vide Vau. 279.*

So, if his parents are not in the actual obedience to the king, he is an alien, though he be born within the dominion of the king: as, a man born in France, Normandy, &c. is an alien, though the king has dominion there *de jure*; because they are not in actual obedience to the king. *7 Co. 18. a. Calvin.*

So, if the king's enemies invade the kingdom, and any one is born there, such issue is an alien. *7 Co. 6. a. 18. a, b. Calvin.*

So,

So, if an alien has issue by an *English* woman out of the king's ligeance, the issue shall be alien, though she is a natural subject; for she is *sub potestate viri*. 1 *Vent.* 422.

And, though an alien friend comes into *England* when he is an infant, and always after continues there, and is sworn to the king, yet he continues an alien. 1 *Rol.* 195. C.

(B.) Who is not an Alien.

(B. 1.) Any born within the Ligeance of the King.

BUT no one is an alien, who is born in a place, then within the king's ligeance, of parents in actual obedience to the king. 7 *Co.* 18. *Calvin.* *Vau.* 279.

So the children of the king's ambassadors, born of *English* parents in a place out of the king's ligeance, are not aliens by the common law. 7 *Co.* 18. a. *Calvin.*

By the *st. de natis ultra mare*, 25 *Ed.* 3. it is declared, that the children of the kings of *England*, in whatsoever parts born, shall inherit after the death of their ancestors.

And by the same *st.* children inheritors born out of the ligeance of the king, whose parents at the time of their birth be at the faith and ligeance of the king of *England*, shall inherit; so that the mothers passed the seas with the licence of their husbands.

And therefore, if a merchant continue beyond sea to merchandise, and has issue there by an *English* woman, such issue shall inherit. *R. Cro. Car.* 601.

So, if the wife be an alien; for she is *sub potestate viri*, and by the common law, *partus sequitur patrem*. *R. Cro. Car.* 602. *Per three J.* 1 *Sid.* 198. *R. Mar. pl.* 150. *D.* 1 *Vent.* 427, 82.

Otherwise, if the parents go beyond sea without licence *R. Cro. El.* 3.

Or, stay there after the licence determined and then have issue *R. Cro. El.* 3. *Vide* 1 *Sid.* 198.

Or, if the father was not a merchant. *Q.* 1 *Sid.* 198. *B. Hufsey* says, generally, that he who is born there, if his father and mother are *English*, shall inherit. 1 *R.* 3. 4. a.

By the *st.* 29 *Car.* 2. 6. all born out of the king's dominion between 14 *June*, 1641, and 24 *March*, 1660, whose fathers and mothers were natural subjects, are natural born subjects to all intents: provided they receive the sacrament in seven years, and take the oaths in one month after.

So by the *st.* 7 *Ann.* 5. the children of all natural born subjects, born out of the ligeance of the queen, her heirs and predecessors, shall be deemed natural born subjects. And this clause was not repealed by the *st.* 10 *Ann.* 5.

And all persons, who shall take the oaths, and subscribe declaration 6 *Ann.* &c. and bring certificates of receiving the sacrament in some Protestant congregation three months before, shall be natural subjects. But this was repealed by the 10 *Ann.* 5. to all naturalized after 4 *Feb.* 1711.

By the *ſt.* 4 *G.* 2. 21. the *ſt.* 7 *Ann.* 5. is explained, to children, whose fathers at their birth were natural born subjects of *England*, or *Great Britain*; but not to children, whose fathers at their birth were attainted of high treason in *England* or *Ireland*, or liable, on their return, to the penalties of high treason or felony, or were in the service of any foreign state in enmity with *Great Britain*.

[By *ſt.* 13 *G.* 3. c. 21. persons born out of the ligeance, whose fathers, by *ſt.* 4 *G.* 2. (explaining *ſt.* 7 *Ann.*) are intitled to the rights of natural subjects, shall also be natural subjects.]

(B. 2.) A Person naturalized.

So, if an alien be naturalized, he shall be to all intents as a natural subject, and shall inherit as if he had been born within the king's ligeance. *Co. L.* 129. a. *Vide for denizen, post, (D. I, &c.)*

If a man take an alien to wife, and afterwards sell his land, and his wife be naturalized, she shall be endowed of the lands sold before her naturalization. *Co. L.* 33. a.

If an alien be naturalized, a son born before shall inherit to him. *Co. L.* 129. a. 1 *Vent.* 419.

So, his brother. 2 *Rol.* 93.

Naturalization can only be by parliament. *Co. L.* 129. a. 1 *Vent.* 419.

Nor can one be naturalized for life only, or, to him and the heirs of his body, or upon condition; for being naturalized, he is absolutely so for ever. *Co. L.* 129. a. *per Mont.* 2 *Rol.* 95. *Vide* 2 *Cro.* 539.

If he be naturalized by the parliament of *England*, he will be a natural subject also in *Ireland*. *Vau.* 291.

But if a man be naturalized by the parliament in *Ireland*, he shall not be a natural subject, nor can inherit in *England*. *R. per three J. Tirrel cont.* 2 *Vent.* 4. 2 *Jon.* 11. *Vau.* 278, 9. 2 *Keb.* 601. *Cart.* 185. 1 *Sid.* 197. Declared by the *ſt.* 10 *W.* 3. 1.

Or, by the parliament in *Scotland*. 1 *Sid.* 197. *Vau.* 278.

By the *ſt.* 7 *Jac.* 2. no person shall be naturalized, unless he hath received the sacrament within a month before the bill exhibited, and take the oaths of supremacy and allegiance in the parliament house, before the bill twice read, which the Lord Chancellor, or Lord Keeper, may administer, if the bill begins in the upper house, and the Speaker, if it begins in the House of Commons.

So, if a man be naturalized, he shall not have collateral abilities, without special words, to do that which he could not have done, if he had been born within the king's ligeance: as, he shall not be enabled to inherit to his ancestor, if he was an alien. 1 *Vent.* 420. 1 *Sid.* 197.

If a man naturalized was a bastard, he cannot inherit. 2 *Rol.* 93, 113.

Or, if he was of the half blood. *Ibid.*

[By

[By 13 G. 2. c. 7. foreigners residing seven years in *American Colonies*, (not absent two months at one time) on taking the oaths, or, if Quakers, the affirmation, are naturalized. All but Quakers and Jews, must take the sacrament three months before, in some protestant and reformed congregation in *Great Britain* or the *American colonies*. By *ff.* 3. Jews taking the oaths may omit the Christian expressions, and yet be naturalized by this act.]

[By *ff.* 20 G. 2. c. 44. this is extended to the Moravian brethren, and all foreign Protestants scrupulous of taking an oath.]

By *ff.* 22 G. 2. c. 45. foreign Protestants serving three years in *English* whale-fishery, are naturalized. If they go abroad for more than twelve months at one time, they forfeit it.]

[By *ff.* 2 G. 3. c. 25. foreign Protestants serving in royal *American* regiment, or as engineers in *America* for two years, naturalized.]

[And by *ff.* 13 G. 3. c. 25. persons naturalized under 13 G. 2. and 2 G. 3. are declared capable of taking office civil or military, or lands, except in *Great Britain* and *Ireland*.]

By *ff.* 14 G. 3. c. 84. persons naturalized shall not have *British* privileges of trade in foreign countries, unless they shall have resided seven years in *British* dominions, without being above two months absent at a time.]

(C.) What Things an Alien may do; what not.

(C. 1.) When he may inherit; when not.

AN alien cannot inherit to his father, who is a natural subject, though he be born in lawful marriage. *Co. L. 8. a.*

Nor can the son of an alien inherit to his grandfather, though the son be a natural subject; for he must inherit *medante patre*.
1 *Vent.* 416.

Nor can the son or descendant of an alien inherit to the brother of the alien being a natural subject. 1 *Vent.* 413, 416.

So no one can inherit to another who derives his blood or relationship to the other through an alien: as a nephew cannot inherit to an uncle, or *e contra*, where the father is an alien.
1 *Vent.* 416, 418. *Vide infra.*

And if he be made denizen, the issue born before cannot inherit. *Co. L. 8. a.* 7 *Co. 7. a. Calvin.* *Vide post*, (D. 2.)

So an alien cannot take by any act of law: as, an husband being an alien, shall not be tenant by the curtesy. 7 *Co. 25. a. Calvin.* *Per Hale*, 1 *Vent.* 417.

A woman alien shall not be endowed. 7 *Co. 25. a. Calvin.* *Per Hale*, 1 *Vent.* 417. *Co. L. 31. b.*

Nor shall an alien be guardian. *Per Hale*, 1 *Vent.* 417.

Yet the king's wife shall be endowed, though she be an alien. *Co. L. 31. b.*

So the wife of a subject, who marries with the king's licence. *Semb. Co. L. 31. b.* 1 *Rol.* 675. l. 15. *Vide Stat. Rot. 8 H. 5. No. 15.*

But if an alien be made denizen, the issue born afterwards may inherit. *Co. L. 8. a. Vide post, (D. 2.)*

If a man has issue two sons, and the elder is an alien, and the younger not, the younger may inherit. *Co. L. 8. a. R. by all the J. 1 Sid. 195. 1 Vent. 413.* though the elder has a son a natural subject. *R. 1 Vent. 413. Hard. 224.*

If an alien has issue two sons born within the king's ligeance, and the one purchases, and dies without issue, his brother may inherit. *Cont. Co. L. 8. a. Per 7 J. acc. in Seaccario, 1 Lew. 60. 1 Sid. 198, 201. Vide the argument for it by Hale. 1 Vent. 413. D. Noy 159. R. 2 Cro. 539. Godb. 275. 2 Rol. 93, 113. Pal. 13.*

So, if the brother be dead leaving a son, the son shall inherit to his uncle; for where the mesne ancestor, either dead or alive at the time of the descent, is inheritable, his son, *jure representationis* shall inherit; otherwise, where the mesne ancestor is not inheritable. *R. per omnes in Seaccario, 1 Vent. 413. inter Cullingwood & Pace.*

But if there be two brothers, the one an alien, and the other a natural subject, who purchases, and dies without issue, the alien has issue a son a natural subject, the son shall not inherit to his uncle. *R. per omnes. 1 Sid. 195. 1 Vent. 413. Cullingwood & Pace. Vide supra.*

Yet now, by the *st. 11 & 12 W. 3. 6.* all natural born subjects may inherit, and make their pedigree by descent, from any ancestor lineal or collateral, although the father, or mother, or other ancestor of such person, by, through, or under whom they derive their pedigree was an alien, in the same manner, as if such ancestor was naturalized, or natural born.

If an alien married an heiress, who was a natural subject, the issue might before this statute have inherited to his mother, though not to his father. *R. 1 Sid. 201. 1 Vent. 422.*

[By *st. 25 G. 2. c. 39.* a natural born subject who derives his pedigree through an alien ancestor, shall not inherit by virtue of *11 & 12 W. 3. c. 6.* unless he was in being and capable of taking at the death of the last seised, to whom he claims as heir.]

[If the descent is cast on a daughter, and a son is born afterwards, he shall be divested in his favour; and if more daughters are born after, they shall take in coparcenary with her on whom the descent was cast.]

(C. 2.) When he may purchase.

If an alien purchase lands or tenements to him and his heirs, he takes the fee-simple, but upon office found it goes to the king, who shall have it by his prerogative, of whomsoever the lands are holden. *Co. L. 2. b.*

If an alien purchase to him and the heirs of his body, he is tenant in tail. *D. 9 Co. 141. 2 Rol. 321.*

And if he suffer a common recovery, and afterwards an office is found, the recovery is good to bar the remainders. *R. 4 Leo. 84.*
1f

If an alien purchase an estate for life, the king upon office found shall have it. *Co. L. 2. b.*

So, if he purchase a term for years. *Ibid.*

But his purchase is only *ad proficuum regis*. 7 *Co. 25. a. Calvin. 1 Leo. 47. 4 Leo. 82.*

And if an alien die, the law vests the freehold and inheritance in the king. *Co. L. 2. b.*

If an alien and another purchase jointly, and the alien dies, the other shall not have the whole by survivorship, but the king shall have the moiety. 1 *Leo. 47. 4 Leo. 82.*

Yet till office found, the moiety survives. 5 *Co. 52. b. Vide post, (C. 4.)*

If an alien friend purchase a copyhold in the name of *A.* in trust for him and his heirs, the king shall have the trust, 2. 1 *Rol. 194. l. 35. Vide post, (C. 3.)*

So, if an alien enemy take a bond, the king shall have it. *Semb. 1 Rol. 195. B. Vide Lut. 34.*

[Choses in action belonging to alien enemy, are forfeited to the crown, but there must be an inquisition to *intitle*; and a peace before inquisition discharges the cause of forfeiture. *Att. Gen. v. Weeden, M. 11 W. 3. Parker 267.*]

Or, an alien friend, who afterwards becomes an enemy. 2. 1 *Rol. 195. B.*

By the *st. 7 R. 2. 12.* no alien shall purchase a benefice within this realm, without licence of the king.

But an alien friend, being a merchant, may take an estate for years in an house for his habitation. *Co. L. 2. b. 1 Rol. 194. l. 17. Cont. Dy. 2. b. in marg.* for he shall take only at will.

Otherwise, if it be land, meadow, &c. not necessary for his habitation. *Co. L. 2. b. 1 Rol. 194. l. 27.*

Or, if he be an alien enemy. *Co. L. 2. b.*

Or, if he be no merchant, though he be in amity. *Co. L. 2. b. 1 Rol. 194. l. 30.*

And if an alien friend, being a merchant, depart the realm, his term for years in an house for his habitation goes to the king. *Co. L. 2. b. 1 Rol. 194. l. 21. Dan. 321. Dy. 2. b. in marg.*

So, if he die; for it does not go to his executor or administrator. *Co. L. 2. b. 1 Rol. 194. l. 23.*

Yet, by some, he may devise goods and leases by his will. *Bend. 36. 1 And. 25.*

So an alien ambassador may take a house, land, &c. for years. *Cro. Car. 8, 9.*

By the *st. 27 Ed. 3. 2.* merchants strangers, not enemies, may safely dwell in the realm. *Dy. 2. b. in marg.*

So, if a statute be acknowledged to an alien, he may have the land upon an extent on the statute, and the king shall not take it. *Dy. 2. b. in marg.*

So a corporation may purchase, though the head of the corporation be an alien. 2 *Rol. 93.*

If an alien purchase a copyhold, or land, in the name of another in trust for himself and his heirs, the king shall have it. *(C. 3.)*
Argued but not R. 24 Car. 1. 1 Rol. 194. l. 35. Dan. 321. A purchase in the name of a trustee.
Al. 15. R. Hard. 495.

But if an alien purchase in the name of a trustee, the king cannot be intitled by inquisition; for the estate in law is in the trustee, not in the alien: but he must sue in *Chancery* to have the trust executed. *R. 1 Rol. 194. l. 40. 534. l. 50. Al. 16. Hard. 495. Dan. 321, 2.*

So an alien cannot have a copyhold, because the king shall not have it, and therefore it will escheat to the lord of the manor.
Dy. 2. b. in marg.

(C. 4.) Various Disabilities.

But an alien born, has no ability to make a feoffment, grant, or lease. *Co. L. 42. b.*

So, an alien cannot be seised to the use of another; for he cannot be decreed to execute it. *1 Co. 127. a. Chudleigh.*

So, if the king, before office confirm his estate, which he has purchased, that does not make his title indefeazable. *Dub. 1 Leo. 47. 4 Leo. 82.*

So an alien cannot enforce the execution of an use at common law, or of a trust now. *Al. 15.*

So, if the possibility of a term for years be limited to *A.* for life, and afterwards to *B.* who is the wife of an alien; it does not vest in the alien. *Vide Eq. Ca. 104. **

So by the *st. 12 & 13 W. 3. 2.* No person born out of *Eng- 2d part of*
land, Scotland, or Ireland, and not of *English* parents (though *2 Mod. Ca.*
 naturalized or made denizen) shall be capable to be of the privy council, of either house of parliament, or to enjoy any office, or place of trust, civil or military, or to have any grant of lands, &c. from the crown to himself, or any in trust for him.

If an alien purchase, though the king is intitled, yet the estate does not vest in him 'till office found. *R. 5 Co. 52. b.*

For 'till office, the alien is seised. *1 Leo. 47. 4 Leo. 82. Vide ante, (C. 2.)*

And if an alien and a subject purchase jointly, they are joint-tenants, and the survivor shall hold 'till office found. *5 Co. 52. b. 1 Leo. 47. 4 Leo. 82.*

And an office to intitle the king to the lands of an alien is not good, if it be under the exchequer seal; for it ought to be under the great seal. *R. 5 Co. 52. a. Mo. 325.*

Vide post, (C. 7.)

(C. 5.) When he may sue; when not.

So an alien enemy cannot have any action real, personal, or mixt. *Dy. 2. b. 19 Ed. 4. 6. 2. 1 Rol. 195. b. Semb. Ow. 45.*

Nor can an alien friend have any, except a personal action.
Dy. 2. b.

When

When it may be pleaded in abatement that the plaintiff is an alien born, *Vide Abatement*, (E. 4.)

But, if an alien be within the kingdom with a safe conduct, or under the king's protection, he may have an action, though his king be in enmity. *R. 1 Sal. 46. R. Cro. El. 683. R. Mo. 431.*

So, a Turk, infidel, &c. is not a perpetual enemy, but may have the privilege of a friend. *1 Sal. 46.*

An alien friend may have all personal actions, for his goods, or property. *1 And. 25. Vide Dy. 2. b.*

So, an action for slander. *R. per four J. Williams cont. 1 Bul. 134.*

[A foreigner must give security for costs before he can proceed in a suit.]

[A Scotsman considered as a foreigner.]

[A deposit of the money for which security would be given, not permitted in lieu of it. *Ker v. Dutche's of Munster*, in *Scac. Hil. 1718. Bunb. 35.*

[So, a person protected by an ambassador, if he sues here originally, but not if he sues for an injunction to stay proceedings at law. *Fenwick v. Fortescue*, in *Scac. M. 1729. Bunb. 272.*]

[But in *B. R.* it is held that a foreigner is not obliged to give security for costs. *Real v. Macky*, *P. 17 G. 2. Str. 1206.*]

* But it is now every day's practice to stay proceedings till security be given. *

[Nor a Scotsman resident in Scotland. *Maxwell v. Mayer*, *T. 33 & 34 G. 2. 2 B. M. 1026.*]

[An alien's property in the funds is under the controul of the court of chancery, though he is in a foreign country. *Anon. M. 1737. 1 Atkyns 19.*]

[A captain of an enemy's ship may sue upon a ransom-bill. *Record v. Bettenham*, *M. 6 G. 3. 3 B. M. 1734.*]

(C. 6.)
In chance-
ry.

By the *st. 31 H. 6. 4.* If a subject offend against any stranger on the sea, or in any port of the realm, there being by way of amity, or safe-conduct, or any other, by attacking his person, spoiling, &c. his ship or goods, the chancellor, with any justice of the one bench or the other, shall upon a bill of complaint make process against the parties to answer, and for restitution, &c.

(C. 7.) What other Privileges an Alien shall have; what not.

So an alien may dispose of his personal goods by his will. *2 Rol. 94. 1 And. 25.*

May be an executor, or administrator. *R. Cro. Car. 9.*

Though his king be in enmity. *Adm. Cro. El. 683.*

By the *st. 1 R. 3. 9.* an alien artificer shall not remain, or use any trade in *England*, unless as servant to a subject, on pain to forfeit all his goods.

By

By the same *st.* he shall not make any cloth, nor put any wool to work.

By the same *st.* he shall not sell in gross, but by retail.

By the *st.* 1 *R.* 3. 9. and 14 *H.* 8. 2. he shall not take any servant, or apprentice, unless his son, daughter, or a subject born, on pain of 20*l.* by the *st.* 1 *R.* 3. 9. and of 10*l.* by the *st.* 14 *H.* 8. 2. nor by the *st.* 21 *H.* 8. 16. above two servants strangers at a time.

By the *st.* 14 *H.* 8. 2. he shall not keep above two journeymen, nor subjects, on pain of 10*l.*

By the *st.* 32 *H.* 8. 16. *f.* 13. he shall not take any messuage, or shop, nor any let him such, on pain of 5*l.*

But by the *st.* 22 *H.* 8. 13. a common baker, brewer, surgeon, or scrivener, are not artificers.

Nor, a vintner. *R.* 3 *Mod.* 94.

By the *st.* 12 *Car.* 2. 18. no alien shall be a merchant, or factor in the plantations.

So by the *st.* 15 *Car.* 2. 15. an alien may set up a trade to dress hemp, flax, make twine, or nets for fishery, or cordage, and tapestry hangings.

By the *st.* 32 *H.* 8. 16. *f.* 9. every alien shall be subject to the laws.

By the *st.* 27 *Ed.* 3. 2. aliens not enemies, may safely dwell in the realm. *Dy.* 2. *in marg.*

So an alien artificer may hire a stable, &c. if it be not a shop or mansion. 1 *Sand.* 8. 1 *Sid.* 309.

By the *st.* 21 *Jac.* 19. aliens shall have advantage of the statutes against bankrupts.

By the course of the *Exchequer*, the son of an alien, though born within the realm, being a merchant, shall pay the customs and duties, as an alien, for the first generation. *Litt.* 140. *Agreed Hard.* 335.

Vide Trade, (A. 1, &c.)

(C. 8.) Trial *per medietatem Linguae*.

In an action by an alien against an alien, by the *st.* 27 *Ed.* 3. 8. the inquest shall be by all aliens.

And by the same statute and the *st.* 28 *Ed.* 3. 13. if one party be alien, and the other denizen, the inquest before all justices shall be by half aliens, if so many be to be found in the vicinage, otherwise by so many as are to be found, and the rest denizens.

And this, by the *st.* 28 *Ed.* 3. 13. though the king be party.

And this privilege has always been allowed since these statutes in all pleas, and before all justices, if it was demanded. *Dy.* 144.

If the alien was plaintiff, as well as if defendant. *Dy.* 144. *b.* and 144. *a.* *in marg.*

And if the defendant does not pray a *venire facias de medietate lingue*, the plaintiff may. *Dy.* 144. *b.*

So, if a full inquest does not appear, there shall be a *tales de medietate lingue*. *R. Poph.* 36.

Or,

Or, if the aliens only make default, so many aliens may be added upon the *tales*. *Poph.* 36.

And by the *st.* 8 *H.* 6. 29. want of freehold shall be no challenge, where the trial is *per medietatem linguæ*.

But if the defendant does not pray a *venire facias de medietate linguæ*, the plaintiff need not; for a trial *per probos et legales homines* will be good. *Dy.* 28. *a.* 144. *b.*

So in high treason, the trial shall not be *per medietatem linguæ*. *R. Dy.* 144. *b.* 145. *a.*

Nor, where an alien sues as administrator, or executor, *en auter droit*, if the intestate or testator was not an alien. *R. Cro. El.* 275. *Dy.* 28. *a.* in marg.

[Though aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them on a *local* statute. Thus a *French* prisoner, indicted of privately stealing from the shop, was acquitted of that, by direction of the judge, and found guilty of the larceny only. *Moliere's Case*, 1758. *Foster* 188.]

(D) Denizen.

(D. 1.) By whom made, and how.

Vide how
naturalized,
ante, (B. 2.)

THE king only has the prerogative to make any alien to be a denizen. 7 *Co.* 25. *b.* *Calvin.* 2 *Rol.* 93.

And cannot grant this prerogative to any other. 7 *Co.* 25. *b.* 2 *Rol.* 93.

The usual manner of a denization is by letters patent. 7 *Co.* 6. *a.* *Calvin.*

So it may be by parliament. *Ibid.*

Or, by conquest; for if the king conquers another kingdom, all his subjects are immediately denizens of that kingdom. *Ibid.*

The king may make any one a denizen for life. 7 *Co.* 6. *a.* *Calvin.* *Per Mont.* 2 *Rol.* 95. 2 *Cro.* 539. *Co. L.* 129. *a.*

Or, only for years. 2 *Cro.* 539.

Or, for himself and the issue of his body. 7 *Co.* 6. *a.* *Calvin.* *Per Mont.* 2 *Rol.* 95. *Co. L.* 129. *a.*

Or, for him and his heirs generally. 7 *Co.* 5. *b.* *Calvin.*

So he may make one a denizen for a particular purpose; as, *quod in quibusdam curiis audiatur ut Anglus.* *Co. L.* 129. *a.*

So he may make one a denizen, upon condition. *Co. L.* 129. *a.* 7 *Co.* 6. *a.* *Calvin.*

And by the *st.* 32 *H.* 8. 16. all aliens made, or to be made denizens, shall be obedient to the statutes of the realm; and in the letters patent of denization, a proviso shall be inserted, that they shall be so.

But this proviso does not make a condition; for if he do not homage, nor be obedient to the law, he shall be punished as the law requires, yet his denization is not void. *R.* 1 *Rol.* 195. *E. Lane* 58, 9.

(D. 1.)

(D. 2.) The Privileges of a Denizen.

If a man be made denizen, he shall have the privileges of a subject born *a parte post*: as, his issue born after his denization may inherit to him. *Co. L. 8. a.*

But if a man be made denizen, his issue born before shall not inherit to him. *Co. L. 8. a.*

If the father be a subject born, and his son an alien; though he be made denizen, he cannot inherit to his father. *Per Hale, 1 Vent. 419. Co. L. 8. a.*

If a father, a subject, has issue two aliens, who are made denizens, and the one dies without issue, the other cannot inherit to him. *R. 1 Vent. 419.*

So, if the grandfather be a subject, the father an alien and made denizen, the son a subject born, and the father dies in the life of the grandfather, the son cannot inherit to his grandfather. *1 Vent. 419.*

Though born after the denization of the father. *Ibid.*

If a wife be an alien, and after alienation of lands by her husband, made denizen, and then the husband dies, she shall not be endowed. *Co. L. 33. a.*

(D. 3.) Who shall not be Denizen.

But if the king grant an office to an alien, that does not make him a denizen; for it shall not enure to two intents. *3 Lib. 243.*

So, if an alien immediately after his birth comes into *England*, and there continues all the time afterwards, it does not make him a denizen. *1 Rol. 195. l. 16.*

A L I E N A T I O N.

(A) Alienation, by the King's Tenant.

(A. 1.) When it shall not be, without Licence.

BY the common law, no fine was paid for an alienation without the king's licence. *Co. L. 43. St. Pr. 27. b.*

But when by the *fl. M. Ch. cap. 32.* it was provided, that none shall give or sell more of his land, than that of the residue the lord may have his services, a fine was claimed by the king, if his tenant aliened without his licence. *Co. L. 43. a.*

And by the *fl. 1 Ed. 3. 12.* it was enacted, that the land should not be forfeited, but a fine paid in *chancery* by due process, for the alienation without licence.

By

By the *ſt.* 17 *Ed.* 2. 7. the king has uſed to rate ſerjeanties, aliened without licence, by a reaſonable extent.

The uſual fine for an alienation without licence, was the value of the land for a year. 2 *Inſt.* 67. *Sav.* 16.

And the fine, for a licence of alienation, was the third part of the annual value. *Ibid.*

So by the *ſt.* 34 *H.* 8. 5. *f.* 13. the fine for a pardon of an alienation, made by a deviſe.

The fine for alienation ſhall be paid by every tenant of the king who holds *in capite*.

If he has only a reverſion in fee, and aliens without licence: but the fine, if there be proceſs againſt the tenant for life, and he by plea ſhews his eſtate, ſhall not be levied upon him. *R. Sav.* 17, 65. *Vide* 2 *Inſt.* 67.

So it ſhall be paid, upon an alienation by way of uſe upon a covenant to ſtand ſeiſed, &c.

If the heir make a bargain and ſale by indenture inrolled, or levy a fine, though it be before livery ſued. *Sav.* 32.

If there be an eſtate-tail, and the tenant in tail make ſeveral alienations, and afterwards it is conveyed to the iſſue in tail, who is remitted; the fines for the alienations made, continue a charge upon him. *R. Sav.* 65.

And all the lands of the alienor, as well as the land aliened, are liable to this fine. 4 *Leo.* 47.

(A. 2.) When it may.

But for alienation of land held of the king, as of an honour, and not *in capite*, no fine was due. *Bro. Alienation* 11.

Nor, for the alienation of the tenant *paravail*, where the *meſne* held of the king.

So, if there was a licence, or pardon of alienation to the feoffees, &c. no fine ſhould be paid for any uſe, which ariſes out of the eſtate of the feoffees.

So tenant for life ſhall not be charged with the fine, for the alienation of him in reverſion. *R. Sav.* 17, 65. 2 *Inſt.* 67.

Nor, tenant in dower for the alienation of her husband; for ſhe claims *paramount*. *Vide Sav.* 65.

So now, by the *ſt.* 12 *Car.* 2. 24. all fines for alienations, ſeizures, and pardons for alienations, are taken away, and diſcharged from 24 *Feb.* 1645.

But it is provided, that this ſhall not be conſtrued to take away any fines for alienation due by particular cuſtoms of particular manors, and places other than fines for alienation of land holden immediately of the king *in capite*.

(B) Alienation by the Tenant of a Common Person.

SO, by the particular cuſtom of any manor, the lord ſhall have a fine upon the alienation of his tenant in fee. 14 *H.* 4. 1. a.

But a custom, to pay a fine of a year and an half's rent of the whole, upon the alienation of any part, is not good. *2 Vent. 134, 5.*
 So, a custom to pay a fine, upon an alienation by a tenant only for life. *Semb: 2 Vent. 135.*

Alienation of Copyhold.

Vide Copyhold, (I. 1.—M. 2.)

Alienation by a Corporation.

Vide Franchises, (F. 18.)

By Husband and Wife.

Vide Baron and Feme, (G. 1, &c.—P. 1.)

By Tenant in Tail.

Vide Discontinuance, (A. 4, &c.—B.—C. 1, &c.—Estates, (B. 22, &c. 33.)

Forfeiture by Alienation.

Vide Copyhold, (M. 2.)—Forfeiture, (A. 1, &c.)

A L I M O N Y.

Vide Chancery, (2 D. 1, &c.)

A L L E G I A N C E.

(A) Allegiance; when due.

ALLIGIANCE, or ligeance, is the lawful obedience, which a subject is bound to render to his sovereign. *Co. 129. a. 7 Co. 4. Calvin.*

And it is due *proprium quarto modo* to the king, *omni, soli, et per. 7 Co. 12. a. Calvin.*

It is due to the king, in his natural capacity. *7 Co. 10. a. Calvin.*

So allegiance is due from a natural subject to the king in all cases, and all kingdoms. *7 Co. 7. b. Calvin.* For he has always the king's protection. *7 Co. 9. b. Calvin.*

Though he hath abjured the realm. *7 Co. 9. b. Calvin.*

So ligeance is *naturalis, acquisita, vel localis.* *7 Co. 5. b. Calvin.*
10. 1. F f As,

As, every subject born, immediately upon his birth ought to pay a natural allegiance to his sovereign, and is called a natural liege man, as the king is said to be his natural liege lord. 7 Co. 4. b. 5. a. b. Calvin.

So a man naturalized, or made denizen, acquires a ligeance to the king. 7 Co. 5. b. Calvin. *Vide Alien*, (B. 2.—D. 1, &c.)

So a man, who comes under the dominion of the king, ought pay a local allegiance; for he has his protection. 7 Co. 5. b. 6. a. Calvin.

And therefore, if an alien friend come into *England*, and commit treason, the indictment shall be *contra ligeantiae suae debitum*. 7 Co. 6. a. Calvin.

But ligeance is *reciprocum ligamen, quia sicut subditus tenetur ad obedientiam, ita rex tenetur ad protectionem*. 7 Co. 5. a. Calvin.

So an alien enemy, if he comes into the realm, does not owe any allegiance, and cannot be indicted for treason; but shall be punished by the martial law. 7 Co. 6. b. Calvin.

[An alien (whether his sovereign is in amity or enmity with us) living here under the king's protection, oweth a temporary local allegiance, and if he committeth an offence amounting to treason in a natural-born subject, he may be dealt with as a traitor. *Foster* 185.]

[So, if alien, having family and effects here under protection, goes to his own country in time of war, and adheres to the king's enemies for purposes of hostility. *Ibid.*]

[Allegiance due from natural-born subjects is perpetual and unalienable; and a commission from a foreign prince is no excuse, though the prisoner had resided in his dominion from his infancy. *Townley's case*, *Foster* 7. *M'Donald's case*, *Fosf.* 59. *Fosf.* 183, 184.]

[Allegiance is due to every king in full and peaceable possession. *Fosf.* 184, 188, 397, 400.]

[Not to any other out of possession (whatever his right or pretensions may be) when the throne is so full. *Ibid.*]

(B.) Oath of Allegiance, &c.

(B. 1.) By the Common Law.

BY the ancient law in the time of King *Arthur*, and afterwards revived in the time of King *Edgar*, every man of the age of twelve years or upwards ought to have been sworn to the king in the tourn, or in the leet. Co. L. 68. b. 172. b. 7 Co. b. 7. a. Calvin. 1 Bul. 199.

But an alien shall not be sworn in the leet. *Pal.* 14.

(B. 2.) By Statute Law.

(B. 2.)
Who ought
to take
them.
Vide Officer,
(K. 7.)

So now, by the *stat. 1 El. 1. c. 19.* every archbishop, bishop and other ecclesiastical person, and officer, and every judge, justice, mayor, and other temporal officer, and every person, who fees or wages of the crown, shall take the oath of supremacy, and fidelity, therein declared and set forth.

So, *f. 24, 25.* every person, before he sue livery, or *ouster le main*, do homage, be received into the queen's service, take orders, or any degree in the university.

So, by the *st. 5 Eliz. 1. f. 5.* every schoolmaster, public or private teacher of children, benchers, reader, utter barrister, antient of any house of court, principal of any inn of *chancery*, attorney, prothonotary, philizer, sheriff, escheator, feodary, and all persons admitted to any office at common law, or other law, shall take the said oath.

By the *st. 3 Jac. 4.* the oath of allegiance is prescribed :

And by the *st. 7 Jac. 6.* all persons above eighteen of whatever sex or degree therein intended, shall take it, *viz.* every archbishop and bishop, before the lord chancellor or lord keeper.

An ecclesiastical judge or officer, before the archbishop, bishop, or ordinary of the diocese, where he exercises his office :

Every person of, or above the degree of a baron or baroness, and all of the privy council, and the presidents of *Wales*, and the North, before four of the privy council, of whom the lord chancellor, treasurer, privy seal, or secretary to be one ; or, if above thirty miles from *London*, before the bishop of the diocese, or such whom the lord chancellor, or lord keeper, by *dedimus potestatem* shall authorize :

The servants of the king, queen, or prince, &c. before lord steward, &c.

Judges, justices of peace, sheriffs, or other officers of justice, or who receive a fee of the king, before lord chancellor, or lord keeper, treasurer, admiral, warden of the *cinque ports*, chief justice of *B. R.* or *C. B.* justices of assize in the county where they reside, or other whom the lord chancellor or keeper shall authorize :

Mayor, or other chief officer of a corporation, before such who administer the oath of office : aldermen, and under-officers, and every freeman of a corporation, before the chief officer in the open hall :

All of the House of Commons, before their entry into the House in every parliament, before the lord steward, or his deputies :

Master of the ordnance, lieutenant of the tower, and mint master, the four principal officers of the navy, under the lord admiral, before lord chancellor, or lord keeper, or lord admiral : and all officers, &c. of the tower, before the lord lieutenant of the tower :

Vice-admirals, captains, and soldiers in the king's ships, before any two of the said principal officers of the navy :

All persons, having the charge of forts, &c. captains of soldiers within the realm, before justices of assize, or two justices of peace :

Doctors, advocates, and proctors of the civil law, and their clerks, before the bishop of the diocese where they reside :

All, who sue livery, or *ouster le main*, before the master, or surveyor, or attorney of the court of wards, in open court :

Serjeants at law, servants to the judges, and officers in serjeant's inn, before one of the chief justices, or chief baron :

All subjects in inns of court, and principals and treasurers of inns of *chancery*, before the benchers, or readers of the said houses : and all admitted into inns of *chancery*, before the principal, or treasurer, and antients, or four of them, in their open halls :

Prothonotaries, filizers, officers, attornies, and clerks of any court of record, before the judges of the same court :

Clerks of *chancery*, and all officers of *chancery*, before the master of the rolls, or two masters in *chancery* :

Parsons, vicars and curates, and others in orders, school-masters, and ushers, before the bishop of the diocese, or ordinary, in open court :

Vice-chancellors of both universities, heads of colleges and halls, proctors, and beadles, before the senior masters in convocation : and others promoted to any degree, before the vice-chancellor in the congregation house : all fellows, and scholars of houses, before the head of such house, in the open hall.

Doctors of physic, or admitted into the college of physicians, before the president of such college.

By the *fl. 25 Car. 2. 2.* all persons admitted, into any office, civil or military, or who shall receive any salary, fee, &c. by patent or grant from the crown, or have any place of trust, or in the navy, or service in the household of the king, or duke of *York*, shall take the said oaths of supremacy and allegiance the next term, or at the next quarter sessions of the place where he resides.

So, by the *fl. 1. W. & M. 8.* all persons, required to take the aforesaid oaths, shall instead take the oaths thereby prescribed.

So, by the *fl. 7 & 8 W. 3. 24.* all who shall act as serjeant, counsellor, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, not having before taken the said oaths, shall incur a *premunire*.

By the *fl. 13 & 14 W. 3. 6.* and *1 Ann. 22.* all in office, &c. (as by the *fl. 25 Car. 2. 2.*) and all ecclesiastical persons, members of colleges and halls in either university, of the foundation, (being eighteen), all teaching pupils in the university or elsewhere, schoolmasters, ushers, teachers of separate congregations, all who act as serjeant, &c. (as by the *fl. 7 & 8 W. 3. 24.*) shall take the oath of abjuration in three months after admission to such place, or practice, in one of the courts at *Westminster*, or at the quarter sessions of the place where he resides ; or at the next term or quarter sessions, though after three months.

So, by the *fl. 6 Ann. 14.* and *8 Ann. 15.* all officers, civil and military in *Scotland* shall take the oaths of allegiance, assurance, and abjuration in the courts of session, justiciary, or *Exchequer* of *Scotland*, or quarter sessions there ; or in *chancery*, *B. R. C. D.* or *Exchequer* in *England*.

So by the *fl. 1 Geo. 1. 13.* all persons in office, &c. (as by the *fl. 1 Ann. 22.*) constables, writers in *Scotland*, being in *London*,

or *Westminster*, or thirty miles distance on 1st day of *Michaelmas* term, shall take the oaths in *chancery*, *B. R. C. B.* or *Exchequer* the same term, or otherwise before 23 *January*, at the quarter sessions of the place where he shall reside on 1 *Dec.* 1715. And all who come after into office, &c. shall do so in three months.

By the *fl. 2 Geo. 2. 31.* it is sufficient, if any take the oaths before the end of the next term, or before next quarter sessions, though not within three months; or if beyond sea, within four months after return; and all omissions before, pardoned. So, by the *fl. 4 Geo. 2. 6.* omissions of such, who take the oaths before 23 *Jan.* 1731. By the *fl. 6 Geo. 2. 4.* before 29 *Sept.* 1733. By the *fl. 7 Geo. 2. 10.* before 29 *Sept.* 1734. By the *fl. 12 Geo. 2. 6.* before 28 *Nov.* 1739.

[By *fl. 6 Geo. 3. c. 53.* the oath of abjuration was altered on the death of the old Pretender, and now runs, "that not any of the descendants of the person who pretended, &c."]

By the *fl. 5 El. 1.* the bishop may tender the oath of supremacy (B. 3.) and allegiance required by 1 *El. 1.* to any spiritual or ecclesiastical person within his diocese. Who may tender them.

And the lord chancellor, or keeper, may grant a commission to tender it to any therein named.

The commissioners may tender the oath, to all, though not named by their commission. *R. Ray. 445.*

Though they are not ministers or officers mentioned by the act. *R. Ray. 445.*

By the *fl. 3 Jac. c. 4. s. 13.* the bishop, or two justices of peace may tender the oath of allegiance therein required to any convict, or indicted for recusancy, or who hath not taken the sacrament twice the year past, and may examine on oath persons unknown, who pass through their county, and if they do not deny being recusant, and not having received the sacrament, may (if not nobleman or noblewoman) tender them the said oath. So justices of assize, and gaol-delivery. *R. Skin. 11.*

And *s. 41.* six of the privy council, whereof the lord chancellor, treasurer, or secretary of state to be one, may tender to nobility.

By the *fl. 7 Jac. c. 6. s. 26.* any of the privy council, or the bishop of the diocese, may require any nobleman or noblewoman of 18 years of age, or any two justices of peace of the county, or corporation, may require any other person of that age to take the said oath: and, if any baron or baroness, of that age be indicted, or convicted for not coming to church, or receiving the sacrament, three of the privy council, of whom the lord chancellor, treasurer, privy seal, or secretary to be one, shall require such oath: and, if any of that age, and under that degree, be so indicted or convicted; or if the minister, constable, and churchwardens, or any two of them, complain to a justice of peace where the person suspected dwells, one justice of peace shall require it.

So two justices of peace may issue a warrant against any one, to bring him before them, in order to take the oath. *R. 12 Co. 130.*

But

But a constable, upon such warrant, cannot break open a house to take him. 12 Co. 131.

By the *st.* 1 *W. & M.* 8. persons shall take the oaths there prescribed, before those enabled to tender the former oaths.

So, by the *st.* 7 & 8 *W.* 3. 27. those, who may lawfully tender the oaths, may tender, or summon any to take the said oaths.

So, by the *st.* 1 *G.* 13. *f.* 10. two or more justices of the peace, or any appointed by the king by order in privy council, or by commission under the great seal, may tender the said oaths to any they suspect to be dangerous, or disaffected to the government.

So, *f.* 11. by writing under their hands and seals, they may summon any to appear before them at a certain time therein appointed, to take the said oaths: which summons shall be served on him, or left at his dwelling or usual abode, with one of the family.

(B. 4.)
The penalty.

By the *st.* 1 *Eliz.* 1. he, who obstinately refuses the oath there prescribed shall lose, for his life only, every ecclesiastical or temporal promotion, or office, or benefice he had at the time of the refusal.

By the *st.* 5 *Eliz.* 1. he, who refuses it, when he ought to take it, or it is tendered, incurs a *præmunire*. 1 *Bul.* 197.

So, by the *st.* 3 *Jac.* 4. *f.* 14. if a person refuse the oath therein prescribed, when tendered by the bishop or two justices, or to be examined upon oath, (unless noble) they may commit him to gaol without bail, 'till next assizes, or quarter sessions, when the oath shall be again tendered, and if refused, the refuser, (unless noble) incurs a *præmunire*.

A *feme covert* shall be committed only 'till she takes the oath.

And noblemen or noblewomen (other than *femes covert*) refusing, when tendered by six of the privy council, incur a *præmunire*.

By the *st.* 7. *Jac.* 6. *f.* 26, 27. refusers to take the oath duly tendered, shall be committed to gaol without bail, by those empowered to tender it, 'till next assizes, or quarter sessions, where the oath shall be again tendered, and a refusal incurs a *præmunire* (except *femes covert*, who shall be committed till they take it;) and such person is incapable of any office, &c. (being no officer of inheritance, or ministerial function) or to practise the common law, physic, surgery, or as apothecary, or other liberal science, 'till he take such oath.

So, he shall be committed for a refusal, though he be a lord of parliament. *D.* 12 Co. 131.

By the *st.* 25 *Car.* 2. 2. *f.* 4, 5. a person thereby required to take the oaths, who shall neglect or refuse, shall be *ipso facto* incapable of office, or employment: and if he executes it after such neglect, he forfeits on conviction 500*l.* and shall be disabled to sue in any court of law or equity; to be guardian, executor

cutor, or administrator; to take a legacy, or deed of gift; or bear any office within the realm.

By the *st.* 1 *W. & M.* 8. any person having office civil, or military, not taking the oaths before 1 *Aug.* 1689, or sooner, if required, his office shall be void: and an archbishop, bishop, or other ecclesiastical person, or head, or fellow of any college, &c. shall be suspended, and if he neglect in six months after, shall be deprived, and his office void: and, if any other refuse them when duly tendered, he who tenders them shall commit him, unless he pay to the poor a sum not exceeding 40s. And so, if he refuse three months after, unless he pay a sum not exceeding 10*l.* nor less than 5*l.* and be then bound to his good behaviour, and to appear at the next assises; where if he refuse, he shall continue bound, and be incapable of office, civil, or military.

And, by the *st.* 7 & 8 *W.* 3. 27. any, who refuses the said oaths when tendered, or to appear when lawfully summoned, &c. shall, 'till he take the said oaths, be liable to the penalties of a popish recusant convict; and the person tendering them shall record the name, surname, and abode of the refuser, and the time of the tender or default, and certify it to the justices of assise, and they to the *Exchequer*.

So, by the *st.* 1 *G.* 13. *f.* 7. all, who refuse to take the said oaths in the places, and at the times prescribed, shall be *ipso facto* adjudged incapable to enjoy their offices, or any profit appertaining to them; and every such office shall be void.

And by *f.* 10, 11. any, who refuses the oaths tendered pursuant to that act, or to appear at the time to which summoned or at the next quarter sessions, and there take the said oaths, shall be adjudged a popish recusant convict, and to forfeit and be proceeded against as such.

How the conviction shall be for the penalty, for a neglect or refusal of the oaths, &c. *Vide in Pleader*, (2 S. 28.)

But by the *st.* 1 *El.* 1. *f.* 26. if any, who had an office of inheritance, after refusal took the oath prescribed, he shall be deemed in like estate, or possession of the said office, as before his refusal. *Vide supra*, *st.* 7 *Jac.* 6.

So, by the *st.* 1 *W. & M.* 8. a person refusing the oaths at the assises was incapable of office, and to continue bound to his good behaviour, only till he took the said oaths.

So, if a man take the oaths at the adjournment of the sessions, it is sufficient. *Semb. Lut.* 909, 911.

A L L I A N C E.

A L L I A N C E.

Vide Prerogative, (B. 3.)

A L L O W A N C E.

Allowance in Fire.

Vide Abjuration, (D)—Franchises, (C)

Allowance of Council.

Vide Parliament, (L. 27.)

A L L O Y.

Vide Money, (B. 2.)

A M B A S S A D O R.

(A) Ambassador.

(A. 1.) Who shall send one; and who not.

AN ambassador is a person sent by one sovereign to another, with authority by letters of credence, to treat upon affairs of state. 4 *Inst.* 153.

And therefore, one who has not sovereign authority, cannot send an ambassador to another. 4 *Inst.* 153. *Gro. de j. b. et p. l. 2. c. 18. f. 2.*

As, a subject, though he be very great. *Moll. de j. mar.* 129.

Nor, a vice-roy. *Moll. de j. mar.* 129.

Nor, one who was formerly a sovereign, but is now deprived of his royalty by conquest, or otherwise. *Moll. de j. mar.* 130. *Gro. de j. b. et p. l. 2. c. 18. f. 2.*

Nor, pirates, or robbers, *nisi fide data jus nanciscuntur.* *Gro. de j. b. et p. l. 2. c. 18. f. 2.*

But the princes of Germany may send ambassadors for their principalities; for they are sovereigns. *Moll. de j. mar.* 129.

And the *Hans* towns; for they are free imperial cities. *Ibid.*

And any, that are in part subject, in part sovereign, *pro parte qua non sunt subditi.* *Gro. de j. b. et p. l. 2. c. 18. f. 2.*

Legati, missi per hos qui summi imperii non sunt compotes, non jure gentium, sed jure civili reguntur. *Gro. de j. b. et p. l. 2. c. 18. f. 2.*

(A. 2.)

(A. 2.) Who shall be; and who not.

A person sent by a sovereign with letters of credence to another is an ambassador, though he be named only envoy, or agent.

4 *Infl.* 153.

But, if he has not letters of credence from his sovereign, he is not an ambassador. *Ibid.*

So, if he be not received, or admitted as an ambassador, he has no privilege as such. *Vide Moll. de j. mar.* 130, 1. *Gro. de j. b. & p. l. 2. c. 18. f. 3.*

Or, if he continues after the time limited for his departure.

And an ambassador may be refused, in respect of him by whom sent: as, if the king, who sends him, be in arms against him, to whom he is sent. *Gro. de j. b. & p. l. 2. c. 18. f. 3. Moll. de j. mar.* 131.

Or, in respect of the person himself who is sent: as, if he be notoriously flagitious. *Ibid.*

If he be disagreeable to the state to which he is sent. *Ibid.*

Or, in respect of the message, upon which he is sent: as, if it be not suitable to the dignity of the state, or seasonable. *Gro. de j. b. & p. l. 2. c. 18. f. 3. Moll. de j. mar.* 131, 2.

But it is contrary to the law of nations, if an ambassador be refused, without cause. *Gro. de j. b. & p. l. 2. c. 18. f. 3. Moll. de j. mar.* 131.

(B) Privileges of an Ambassador; what are allowed, what not.

[THE law of nations (touching ambassadors) in its full extent, is part of the law of *England*, the act 7 *Ann.* c. 12. is only declaratory; and this law of nations is to be collected from the practice of different nations, and the authority of writers, as *Grotius*, *Barbeyrac*, *Binkershoek*, *Wicquafort*, &c. there being no *English* writer of eminence on the subject. *Barbuit's Case*, *H. 10 G. 2. C. T. T.* 281. *Triquet v. Bath*. *P. 4 G. 3. 3 B. M.* 1748.]

[A consul has not the privileges of ambassadors or other public ministers, and still less a person styled agent of commerce. *Barbuit's Case*, *H. 10 G. 2. C. T. T.* 281.]

[A public minister using commerce does not thereby lose his privileges, but his servants trading do lose them. *Ibid.*]

By the law of *England*, as well as the law of nations, an ambassador ought to be secure from all injury, and wrong. 4 *Infl.* 153.

Though he be the ambassador of an enemy. *Ibid.*

Though he be outlawed, or a rebel to the sovereign to whom he is sent; when he is received as ambassador. *Ibid.*

And therefore, if an ambassador infringes upon an act of parliament, or the common law, or custom of the realm (if his offence

fence be not at the same time against the law of nations) he shall not be punished. 4 *Inst.* 153. *R.* 1 *Roll.* 175. *Moll. de j. mar.* 139.

As, if he import goods prohibited by statute. *Moll. de j. mar.* 139.

So, if an ambassador contract a debt, his person and goods cannot be seized, but the party ought to apply to him amicably, and if he refuses, &c. resort must be had to his sovereign, or to such means as are used against debtors out of the realm. *Gro. de j. b. & p. l. 2. c. 18. f. 9.*

And now, by the *st. 7 Ann.* 12. all writs and process, by which an ambassador, or other foreign minister, received as such, or his domestic servant, may be imprisoned, or his or their goods may be distrained, seized, or attached, shall be void.

And any, suing forth such process, or prosecuting it as attorney or solicitor, or executing it as an officer, and thereof convicted by confession, or one or more witness, before lord chancellor or lord keeper, the chief justice of *B. R.* or *C. B.* or any two of them, shall suffer such penalty and corporal punishment as they shall think fit.

And therefore an arrest, and bail-bond given upon it, shall be avoided upon motion. 2 *Mod. Ca.* 288.

[If the sheriff's officer lets defendant go, on his producing a certificate that he is chaplain to an ambassador; yet if it appears that he did no duty, and was not entered in the office, the sheriff shall return the writ. *Seacomb v. Bowlney*, *T.* 16 *G.* 2. *Wilf.* 20.]

The privileges allowed to an ambassador extend to his companions, if he does not give them up; and therefore there ought to be a petition to him to deliver them up. *Gro. de j. b. & p. l. 2. c. 18. f. 8.*

But by the *st. 7 Ann.* 12. that act does not extend to a merchant, or trader, within the description of any of the statutes of bankrupts, who puts himself into the service of any such ambassador.

Nor shall any be punished for arresting the servant of an ambassador, unless his name be registered with the secretary of state, and by him transmitted to the office of the sheriffs of *London*, and *Middlesex*, who shall hang up the same in some public place in their office.

[Registering the name in the secretaries office and transmitting it to the sheriff's, is not a condition precedent to privilege, but relates only to the bailiff arresting. *Heathfield v. Chilton*, *H.* 7 *G.* 3. 4 *B. M.* 2015.]

So he shall not be within the act, if he be not actually a servant, though he be registered. *F.* g. 200.

[The servant must shew he was in the service at the time of the arrest. *Heathfield v. Chilton*. *H.* 7 *G.* 3. 4 *P. M.* 2015.]

Yet it is not necessary, that he actually reside in the ambassador's house. *F.* g. 200.

* But

* But servants to ambassadors have no privilege, unless, *bona fide*, menial and domestic servants. *Poitier & Croza*. 1 *Bl. Rep.* 48.*

[If a *bona fide* service is proved, it is sufficient, though every particular act of service is not specified; and it must not be supposed collusive, on bare suspicion only. *Barbuit's Case*, *H. 10 Geo. 2. T. T.* 281. *Triquet v. Bath*, *P. 4 G. 3.* 3 *B. M.* 1478.]

[A man's having been a trader seven years ago does not hinder his having privilege. *Ibid.* * & 1 *Bl. Rep.* 471.*]

[His servants have privilege from arrest on execution as well as other process, though they do not lie in his house, if they do some actual service there. *Evans v. Higgs*, *P. 1 G. 2.* *Wedmore v. Alvarez*, *H. 4 Geo. 2.* *Str.* 797. *Ld. Raym.* 1524.]

[Being menial servant is not sufficient, he must be domestic. *Barnes* 370.]

[A person retained to be interpreter to ambassador, and to transact his business in *London* and *Westminster* for annual wages, is not intitled to protection unless he shews that he has acted as domestic servant. *Malachi Carolino's Case*, *T. 17 G. 2.* *Wilf.* 78.]

[It is not sufficient to shew that defendant lies at the house and is a domestic servant in general, his particular office must be set out. *Holmes v. Gordon*, *M. 7 G. 2. B. R. H.* 2.]

[A land-waiter officiating as such, cannot be esteemed a domestic of a foreign minister though actually hired and serving him. *Masters v. Manby*, *M. 31 G. 2. 1 B. M.* 401.]

[Nor the purser of a man of war. *Darling v. Atkins*, *M. 10 Geo. 3.* 3 *Wilf.* 33.]

[Nor a man who calls himself merchant. *Fontainer v. Heyl*. *T. 5 Geo. 3.* 3 *B. M.* 1731.]

[Nor a justice of the peace not living in the house. *Barnes* 370.]

[Nor a trader residing at his own house, his (pretended) master being abroad. *Barnes* 374.]

[*A.* is protected by the *Morocco* ambassador, on his departure plaintiff proceeds against *A.* now unprotected, and obtains judgment.

A. brings error, pending which he is hired as physician to *H.* a minister, at 40*l.* per ann. he prescribes for *H.*'s servants; he prescribes for no other person; he had formerly been a trader; when he commenced physician appears not. He keeps a coach and livery servants. *H.*'s secretary sends word to the sheriff that *A.* is protected by *H.* *A.* is not intitled to privilege. *Lockwood v. Coysgarne*, *P. 5 G. 3.* 3 *B. M.* 1676.]

But, if an ambassador commit a crime *contra jus gentium*, he shall be punished as another alien, without being remanded to his sovereign. 4 *Inst.* 153. *Vide* 1 *Rol.* 175.

As, if he commit high treason against the king here. 4 *Inst.* 153.

If he incite his subjects to rebellion. 4 *Inst.* 152.

[An ambassador can at worst be considered as an enemy subject to the law of nations, never as a traitor subject to our municipal law;

law; unless perhaps in case of attempts directly and immediately against the life of the king. *Foster* 187.]

So, if he commit felony. 4 *Inst.* 153.

So, if an ambassador commit adultery, or any other crime against the law of nations, he may be prosecuted for it here. 4 *Inst.* 153.

So, if an ambassador make a contract which is good *jure gentium*, he shall answer for it here. 4 *Inst.* 153.

Vide Parliament, (L. 29.)

A M B I G U I T Y.

Vide Chancery, (3 A. 8.)—*Parols*, (A. 3, 4.)

A M E N D M E N T.

(A) When allowed by the Common Law.

BY the common law, an amendment was allowed of a small misprision, in the case of the king. As, in *quare impedit* the original, being *presentere*, for *presentare*, was amended. 8 *Co.* 156. b.

So, *presentare ad rectoriam*, for, *ad ecclesiam*. 4 *Leo.* 12.

So in an information a small misprision might be amended.

1 *Lev.* 189. *Vide post*, (2 C. 2.)

As, in the title of the record: as, *quindenam Martini*, for, *Hilarii*. R. 3 *Mod.* 167.

So, in an indictment for a nuisance, where the *similiter* was omitted in the issue. 2 *Rol.* 59.

And where, *the clerk of assise qui tam*, &c. *similiter*, is omitted. R. 2 *Cro.* 502.

Where an indictment against two is in the singular number. 2 *Bul.* 35.

If an indictment removed by *certiorari* varies from the original; for the transcript only is returned. *Dub.* 1 *Vent.* 13.

[After a special verdict, the *nisi prius* roll of an indictment removed by *certiorari*, may be amended by the record of the indictment. *Rex v. Hayes*, T. 3 G. 2. *Str.* 843. *Ld. Raym.* 1518.]

So a misprision of the court itself was amendable: as, non-entry of a continuance, or essoin. 8 *Co.* 156. b.

So, where the *jurata* was entered between the tenant and voucher where it ought to be between the demandant and voucher whom the tenant vouched to warranty, and who warranted to him. R. 8 *Co.* 156. b.

So, where judgment in a *quo warranto* was entered upon a disclaimer, the omission of the date of the patent, was amended in the ingrossing of the judgment. R. *Cro. Car.* 144.

So misawarding of process upon the roll was amendable the same term. R. 1 *Sal.* 51.

So, if a record removed was filed upon the file of another term, it might be rectified. *Mod. Ca.* 18.

So a variance in the record from the original, was amendable in the same term; for then the record is in the breast of the judge. *8 Co.* 156. *b.*

[Declaration *qui tam*, &c. for usury, may be amended by altering the date of a note after issue joined, while all is in paper. *Bondfield v. Milner*, *M.* 1 *G.* 3. 2 *B. M.* 1098.]

* But where a *qui tam* action for usury had been depending four years, the court would not allow amendments to be made in the declaration, though the pleadings were still in paper. *2 Term Rep.* 707. *

* [The bailpiece may be amended, by inserting the return of the writ. *Barnes* 4.]*

* [So, a mistake of the filazer, in mentioning one action for another in the bailpiece. *Id.* 59.]*

(B) When not.

BUT an original at the suit of a common person was not amendable by the common law. *R.* 8 *Co.* 156. *b.*
* *Ld. Raym.* 565. *

So a misprision of the clerk was not amendable in another term by the common law; for then the roll was the record. *Co.* 157. *a.* * *Ld. Raym.* 565. *

Though the misprision was only in the process. *8 Co.* 157. *a.*
As, if an erroneous process was sued, where the award of process upon the roll was well. *R.* 1 *Sal.* 51.

So a misprision in the transcript of a record, of an attainder for murder, certified by the clerk of assise, where the entry of a continuance was omitted, shall not be amended, the consequence being so penal. *R.* 1 *Rol.* 196. *a.* *Jen.* 420.

So the omission of words in a judgment for treason shall not be amended, though they were mentioned in the minutes of the judgment. *R.* 4 *Mod.* 395.

(C. 1.) When by Statute. Process.

BUT by the *st.* 14 *Ed.* 3. 6. (which was the first statute for amendment), it was enacted, That the misprision of the clerk in process, by writing a letter or syllable too little, or too much, be amended in due form.

And this extends only to the proceeding out of the plea roll, after the original, and before judgment. *8 Co.* 157. *b.*

And extends to a word, as well as a letter or syllable; for by the misprision of a syllable the word was deficient. *8 Co.* 158. *a.*
So to a title. *8 Co.* 158. *a.*

But

law; unless perhaps in case of attempts directly and immediately against the life of the king. *Foster* 187.]

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BY the common law, an amendment was allowed of a small misprision, in the case of the king. As, in *quare impedit* the original, being *presentere*, for *presentare*, was amended. 8 *Co.* 156. b.

So, *presentare ad rectoriam*, for, *ad ecclesiam*. 4 *Leo.* 12.

So in an information a small misprision might be amended.

1 *Lev.* 189. *Vide post*, (2 C. 2.)

As, in the title of the record: as, *quindenam Marini*, for, *Hilarii*. *R.* 3 *Mod.* 167.

So, in an indictment for a nuisance, where the *similiter* was omitted in the issue. 2 *Rol.* 59.

And where, *the clerk of assise qui tam*, &c. *similiter*, is omitted. *R.* 2 *Cro.* 502.

Where an indictment against two is in the singular number. 2 *Bul.* 35.

If an indictment removed by *certiorari* varies from the original; for the transcript only is returned. *Dub.* 1 *Vent.* 13.

[After a special verdict, the *nisi prius* roll of an indictment removed by *certiorari*, may be amended by the record of the indictment. *Rex v. Hayes*, T. 3 G. 2. *Str.* 843. *Ld. Raym.* 1518.]

So a misprision of the court itself was amendable: as, non-entry of a continuance, or essoin. 8 *Co.* 156. b.

So, where the *jurata* was entered between the tenant and voucher where it ought to be between the demandant and voucher whom the tenant vouched to warranty, and who warranted to him. *R.* 8 *Co.* 156. b.

So, where judgment in a *quo warranto* was entered upon a disclaimer, the omission of the date of the patent, was amended in the ingrossing of the judgment. *R. Cro. Car.* 144.

So misawarding of process upon the roll was amendable the same term. *R.* 1 *Sal.* 51.

So, if a record removed was filed upon the file of another term, it might be rectified. *Mod. Ca.* 18.

So a variance in the record from the original, was amendable in the same term; for then the record is in the breast of the judge. *8 Co.* 156. *b.*

[Declaration *qui tam*, &c. for usury, may be amended by altering the date of a note after issue joined, while all is in paper. *Bondfield v. Milner, M.* 1 *G.* 3. 2 *B. M.* 1098.]

* But where a *qui tam* action for usury had been depending four years, the court would not allow amendments to be made in the declaration, though the pleadings were still in paper. *2 Term Rep.* 707. *

* [The bailpiece may be amended, by inserting the return of the writ. *Barnes* 4.]*

* [So, a mistake of the filazer, in mentioning one action for another in the bailpiece. *Id.* 59.]*

(B) When not.

BUT an original at the suit of a common person was not amendable by the common law. *R.* 8 *Co.* 156. *b.*
* *Ld. Raym.* 565. *

So a misprision of the clerk was not amendable in another term by the common law; for then the roll was the record. *Co.* 157. *a.* * *Ld. Raym.* 565. *

Though the misprision was only in the process. *8 Co.* 157. *a.*
As, if an erroneous process was sued, where the award of process upon the roll was well. *R.* 1 *Sal.* 51.

So a misprision in the transcript of a record, of an attainder for murder, certified by the clerk of assize, where the entry of a continuance was omitted, shall not be amended, the consequence being so penal. *R.* 1 *Roll.* 196. *a.* *Jen.* 420.

So the omission of words in a judgment for treason shall not be amended, though they were mentioned in the minutes of the judgment. *R.* 4 *Mod.* 395.

(C. 1.) When by Statute. Process.

BUT by the *st.* 14 *Ed.* 3. 6. (which was the first statute for amendment), it was enacted, That the misprision of the clerk in process, by writing a letter or syllable too little, or too much, be amended in due form.

And this extends only to the proceeding out of the plea roll, for the original, and before judgment. *8 Co.* 157. *b.*

And extends to a word, as well as a letter or syllable; for by the misprision of a syllable the word was deficient. *8 Co.* 158. *a.*
So to a title. *8 Co.* 158. *a.*

But

But the statute 14 *Ed.* 3. 6. does not extend to the roll itself, but only to process out of the roll, viz. writs which issue in process out of the record. 1 *Sal.* 51.

Nor, to process, which issues in a criminal case. *R.* 1 *Sal.* 51.

By the *st.* 9 *H.* 5. 4. confirmed by the *st.* 4 *H.* 6. 3. justices before whom a record is depending by adjournment, error or otherwise, may amend process as long as such record is before them, as well after judgment as before.

And by the *st.* 8 *H.* 6. 12. confirmed by the *st.* 8 *H.* 6. 15. judges may examine, and amend in affirmation of judgment, all that to them seems misprison of the clerk in any process, so that by such misprison no judgment be reversed or annulled; except in appeals, indictments of treason, or felony, or outlawry.

By the *st.* 18 *Eliz.* 14. After verdict, no judgment in any court of record shall be stayed or reversed, for any default in process upon, or after any *aide prier*, or voucher; but this extends not to process on an appeal, or indictment.

And by the *st.* 4 & 5 *Ann.* 16. All the statutes of jeofails shall be extended to judgments entered after 1st day of Trinity term upon confession, *nihil dicit*, and *non sum informatus*, in any court of record, and to any such judgment after writ of inquiry executed thereon.

The statute 8 *H.* 6. enlarges only the subject matter of the statute 14 *Ed.* 3. 6. 1 *Sal.* 51.

[If the words *de placito transgressionis* are left out in the *latitat*, or if there is no *English* notice under the process, it is cured by taking the declaration out of the office. *Caswell v. Martin*, *P.* 10 *Geo.* 2. *Morgan v. Lookup*, *P.* 9 *G.* 2. *Str.* 1072.]

* So before taking out the declaration, such omission is amendable, though at the suit of a common informer. 1 *Bl.* *Rep.* 462. *

If a *venire facias* and *habeas corpora* in trespass be in *placito debiti*, after verdict it shall be amended. *R.* 1 *Rol.* 204. l. 33.

So, if after *et habeas ibi*, these words, *nomina juratorum*, be omitted. *R.* 1 *Rol.* 204. l. 40. *R.* *Hob.* 68. *Cro. El.* 467.

Or, the word, *habeat*, in, *quorum quilibet habeat* 20l. *R.* *Rol.* 204. l. 43.

Or, the word, *duodecim*. *R.* 1 *Rol.* 204. l. 46.

Or, the words, *quorum quilibet*. *R.* 1 *Rol.* 204. l. 50.

Or, the words, *qui nulla affinitate attingunt*. *R.* 1 *Rol.* 204. l. 52.

So, if a *disfringas* omit, or mistake, the day or place of assise, it shall be amended by the roll. *R.* 3 *Mod.* 78.

[If the word *vic.* is omitted in *disfringas*, (as *rex*, &c. *Somerset* *salut'*) it may be amended after error brought. *Phillips v. Smith*, *M.* 5 *G.* *Str.* 136.]

If a *disfringas* was in the time of Queen *Eliz.* and the *alias distringas* says, *juratores summonitos in curia nostra*, though teste'd the time of King *James*. *R.* 2 *Cro.* 162.

When a *venire facias*, &c. shall be amended, in the name of a juror, or return. *Vide post*, (C. 2.)—(F.)—(G. 1, 2.)

[If the *venire* is tested the first of *Hilary*, and the award is for *quind^o Martini*, the teste may be amended. *Philips v. Smith*, *M. 5 G. Str.* 136.

When it shall not be amended. *Vide post*, (V. 1.)

So a misprision, in process out of *chancery* on a statute-merchant, shall be amended. *Adm. 1 Rol.* 198. *l.* 35.

So, if the *disstringas* and *jurata* are well, a misprision in the *nisi prius* roll shall be amended by the plea roll. *1 Sal.* 48.

But a misprision in the *venire*, *disstringas*, or *jurata*, by which the judge has not authority to try the cause, shall not be amended after verdict: As, if a *disstringas* be of a jury *tres Trin.* for *tres Mich. nisi J. Holt.* 27 *Jun. prius venerit*; for it is impossible, *quod iudex prius venerit*, and then he has no authority. *R. 1 Sal.* 48. *R. 2 Cro.* 162.

(C. 2.) Misconveying of Process.

By the *st.* 32 *H.* 8. 30. After verdict in the king's courts of record, judgment shall be given, notwithstanding any misconveying of process, and such judgment shall stand without being reversed by writ of error, or false judgment, as if no such neglect had been.

So by the *st.* 4 & 5 *Ann* 16. After judgment by confession, *nihil dicit*, or *non sum informatus*, in any court of record it shall not be reversed, and no such judgment upon any writ of inquiry executed, shall be stayed or reversed for any matter which would be cured by any of the statutes of jeofails, in case of a verdict.

And by the same statute, all statutes of jeofails shall extend to all suits for recovery of any debt, immediately owing, or any revenue of her majesty, and to all courts of record in the kingdom.

And therefore, if a *venire facias* or other process be teste'd before appearance or declaration; it shall be amended by the roll, which is the warrant for awarding the process. *R. 2 Cro.* 64. 458.

So, if it be teste'd *die dominico*, which is not *dies juridicus*. *R. 2 Cro.* 64. 162. *R. Cro. El.* 183. *Mo.* 684.

Or out of term, or after trial. *R. 2 Cro.* 162. *R. Tel.* 64. *R. Mo.* 465. *Cro. El.* 467. *Noy* 57.

Or, after the return. *R. Tel.* 64. *R. Cro. El.* 203. *R. 2 Cro.* 442. *R. Cro. Car.* 38. *Cont. 1 Rol.* 200. *l.* 41. 44.

Or, the same day with the return. *R. Mo.* 599. *R. 2 Brownl.* 102.

So, if a *venire* be awarded returnable *tres Trin.* and the writ is made returnable at a day after or before; it shall be amended by the roll. *R. Cro. El.* 761. *Mo.* 711. *R.* that it shall be amended by the statute 18 *El.* 14. *Cro. El.* 767. 820. *Mo.* 696.

So, if the award upon the roll be, in *placito transgressionis*, and the *venire* be, in *placito transgressionis super casum*. *R. Litt.* 54.

But

But irregular and illegal process shall not be aided: As, if a *subpoena* be awarded against a defendant in an information for usury. *R. 1 And. 48. Kel. 214.*

Or, for perjury. *Dan. 352.*

Or, a *petit cape* in ejectment.

Or, a *disfringas*, or attachment in a real action.

So process, which has not the roll for warranting the amendment, cannot be amended: As, if it be directed to the sheriff, with a blank for the county. *Per two judges, Yel. 64.* But *R.* that it may be amended by the roll. *2 Cro. 78. Yel. 69.*

So, if the *venire* upon the record be returnable, at a day after the term. *R. Cro. El. 605.*

If the *disfringas* be teste'd upon a day after the return of the *venire*; for it ought to be the same day. *Mod. Ca. 286.*

So, if the subsequent process be not warranted by the precedent, it shall not be amended: As, if an *habeas corpora jurator' summonit' in curia nostra* be in the time of *Q. Eliz.* and afterwards a *disfringas* goes in the time of *K. James ad disfrigend' juratores summonitos in curia nostra*, it shall not be amended: for the jury can only be summoned by the *venire*, which was in the time of *Q. Eliz.* *R. 2 Cro. 89. 1 Rol. 199. l. 5.*

If there be a *disfringas apponere decem tales*, it shall not be amended; for there can be no *tales* joined, but only to the jury summoned by the *venire.* *R. 1 Rol. 199. l. 49.*

If the *venire facias* was to the coroner, and the subsequent process be to the sheriff. *R. Mo. 356.*

And by the *st. 21 Jac. 13.* After verdict, no judgment shall be stayed or reversed, for that the *venire facias, habeas corpora, or disfringas* is awarded to a wrong officer, upon an insufficient suggestion, or that any juror, who tried the said issue, is misnamed in surname, or addition in any of the said writs.

Nor by the *st. 4 & 5 Ann. 16.* Any judgment in any court of record on confession, *nihil dicit, non sum informatus*, or after writ of enquiry executed.

At common law if a man, rightly named in the *venire facias*, was misnamed in the *habeas corpora*, or *disfringas*, it was not amendable; for the process was discontinued. *9 Ed. 4. 14.*

But discontinuance of process was aided by the statutes *32 H. 8. 30. and 18 El. 14.* and therefore if a man be rightly named in the *venire*, if his addition vary in the *habeas corpora*, or *disfringas*, it was amendable. *R. 1 Rol. 197. l. 25.*

So, if his surname was mistaken in the *habeas corpora*, or *disfringas.* *R. 1 Rol. 196. l. 35.*

But before *21 Jac. 13.* If the *venire facias* was erroneous, though the *disfringas*, &c. was right, it was not amendable. *1 Rol. 204. l. 5.*

And now, though the statute *21 Jac. 13.* does not help, where the Christian name of a juror is mistaken, yet if a man rightly named in the *venire facias* and *disfringas* *Sam. H.* be named *Dam. H.* in the *nomina juratorum*, and so called and sworn upon the record, if it appears upon examination, that he

was the person returned, and that there is no other of the same name in the same parish, and that he appeared supposing himself to be called *Sam. H.* and that the clerk had the *disfringas* before him, when he wrote the *nomina juratorum*, it shall be amended; for it is but a misprision of the clerk. *R. 1 Rol. 197. l. 5. 20.*

When a misprision in the pannel or return of the *venire facias*, *habeas corpora*, or *disfringas*, shall be amended, *vide post*, (F.)—
(G. 1, 2.)

(D) Original, and other Writ.

(D. 1.) Misprision of the Clerk therein shall be amended.

BY the *st. 8 H. 6. 12.* confirmed by the *st. 8 H. 6. 15.* Judges may examine, and amend in affirmance of judgment, all that to them seems misprision of the clerk in any writ, &c. (except in appeals, &c. and the substance of proper names, surnames, and additions, pursuant to the *st. 1 H. 5.* in original writs, writs of exigent, and other writs containing proclamation.)

And therefore if the clerk mistake the instructions given to him by the party, this may be amended: As, if the *præcipe* delivered by the attorney was *præcipe A. militi, alias diæ*, a *generoso*, and the curfitor makes the writ, *præcipe A. generoso*, and the *apias* and other process are according to this; it shall be amended. *R. 8 Co. 159. 2 Rol. 198. l. 20.*

So, if the clerk had a bond or a copy of it for his instruction, and he varies from the copy, in the writ. *8 Co. 159. a. Vide st. (T. 1.)*

If the instruction for a *formedon* be, that the land descended *A. as son and heir*, and he omits the word, *heir*. *8 Co. 159. b.*

If the instruction for a *quare impedit* be, *ad ecclesiam*, and the clerk write, *ad vicariam*, or *è contra*. *1 Lev. 2. R. Cro. 74.*

If the instruction be true, and the curfitor mistake the name, addition of the defendant. *2 Vent. 46.*

So, if the instruction be for a trespass *contra pacem nostram et regis*, and the curfitor makes the writ *contra pacem nostram*. *R. 2 Vent. 49. * Ld. Raym. 1057. **

Scire facias, and all proceedings against bail, may be amended record in original action. *Barnes 4.]*

Sci. fa. shall not be amended if advantage of surrendering principal will be thereby lost. *Barnes 27.]*

Bill against attorney, from *producit sciam*, to *petit remedium*, &c. *Barnes 3.]*

Writ of *hab. corp. jur'* may be amended in the day of *nisi*. *Barnes 5.]*

Title of *certiorari*, by consent. *Barnes 12.]*

ol. 1.

G g

[If

[If bill is intituled *Trin. 19 G.* instead of *19 & 20 G.* it may be amended by instructions, and prothonotary's book. *Barnes 16.*]

[But title of declaration in ejectment cannot, for there is nothing to amend by. *Ibid. Barnes 186.*]

[*Teste* and return of writ of entry, not amendable after death of vouchee, where no misprision of clerk. *Barnes 17.*]

[Bill against attorney, and declaration, by striking out commenced. *Barnes 24.*]

[By adding to damages, on costs. *Barnes 26.*]

(D. 2.) False Latin.

So, if the clerk mistake in writing a word not *Latin* for *Latin*, it shall be amended; as *imaginavit*, for, *imaginatus est*. 8 Co. 159, b.

[If there are four tenants in dower, and the entry is *quod ipse exact. non. ven.* the court will take *ipse* to be the plural, agreeing with *personæ* understood. *Dobson v. Dobson*, P. 7 G. 2. B. R. H. 19.

So any false *Latin* shall be amended in a judicial writ, count, pleading, or judgment. 10 Co. 133. a.

So, in an original writ. R. 2 Sand. 39. Vide in Abatement. (H. 2.)

So, in an original in ejectment, if he write *divisit*, for, *dimisit*, though *divisit* be *Latin*; for it was a misprision of the clerk. R. 1 Rol. 198. l. 30.

Vaccaria, for *vicaria*. 1 Lev. 2.

Singular number for the plural, or *è contra*. R. 2 Bul. 35. * Str. 807. *

(D. 3.) Word of Course.

So, if he adds, or omits a word, &c. of course: As, *De gratia*, in the stile of the king being omitted, shall be amended. 8 Co. 160. a.

Omission of, *ostensus quare non fecerit*. 8 Co. 160. a. Mo. 5.

Or, if he mistake an obvious matter: As, if a writ to the sheriffs of *London* be directed *vicecomiti Lond.* *præcipimus tibi*, when it should be, *vobis*, it shall be amended. R. 1 Rol. 200. l. 32.

In an *habeas corpus*, if after, *et habeas ibi*, the words, *nomine juratorum*, are omitted, it shall be amended. R. 1 Rol. 200. l. 37. Vide ante, (C. 1.)

In a *quare impedit* if, *ad*, be omitted in the words, *quæ ad nationem suam spectat*. R. Cro. El. 119.

So, if there are not 15 days between the *teste* and return of *venire facias*. R. 1 Leo. 329.

* So, of a *capias ad respondendum*. 3 Wils. 454. 2 Rep. 918. *

* So, a writ of *ca. sa.* may be amended after it has been executed, by making it *before our justices*, instead of *before us*, especially where it is properly awarded on the roll. 2 *Bl. Rep.* 836. *

(D. 4.) Word defaced.

So, if a record be defaced by moisture, &c. it may be amended. *R. 8 Co. 160. b.*

So, if words are obliterated by negligence in keeping, they may be amended. *R. 8 Co. 160. a.*

And the amendment shall be according, and conformable to the other parts of the record, which are not obliterated. *8 Co. 160. a.*

So, if any part of the record be stolen, it may be supplied by other parts of the record. *R. 8 Co. 160. b.*

Otherwise, if there are no other parts of the record, or an exemplification to do it by; for then it cannot be amended. *8 Co. 160. b.*

* Where the original record was lost out of the officer's pocket, in carrying it to the house of lords, on a writ of error, the court ordered a new entry to be made. *Str. 141. **

* And where the roll of the judgment was *docketed*, leave was given to file a *new* roll, defendant being dead, and the executrix consenting. *Str. 833. **

* So, where a writ of enquiry was executed, and costs taxed but no final judgment, and was afterwards lost, leave was given for a new writ of enquiry and inquisition according to the sheriff's notes, and that the master should indorse the costs which by the commitment book appeared to have been taxed. *Str. 1077. **

* So, where the *poslea* was lost, a *new* one was ordered to be made out from the record above, and the associate's notes. *Str. 1264. Barnes. 14. **

(D. 5.) Default of Form.

By the *st. 18 El. 14.* After verdict in any court of record, judgment shall not be stayed or reversed for false *Latin*, variance from the register, or other default in form in any writ original or judicial, or for want of writ original or judicial; but this extends not to appeals or indictments.

By the *st. 21 Jac. 13.* After verdict, &c. judgment shall not be stayed or reversed for variance between the original writ or bill, and the declaration, plaint, or demand in form only; except appeals and indictments.

Nor, by the *st. 16 & 17 Car. 2. 8.* for lack of form, or other matters not against the right of the suit, or whereby the issue or trial is altered.

Nor, by the *st. 4 & 5 Ann. 16.* Judgment on confession, *nihil dicit, non sum informatus* or after writ of inquiry, so as there be an original writ, or bill, and warrants of attorney duly filed.

Nor, by the *fl.* 5 *G.* 13. for any defect in form or substance.
 And therefore, where false *Latin* was not amendable after the
fl. 8 *H.* 6. 12. 8 *Co.* 859. *b.*
 Yet it shall not be amended.

(D. 6.) Default of an Original.

So now, the default of an original is helped: As of a summons in dower. *Noy* 22.

And default of a bill in *B. R.* for it is in the nature of an original. *R. Hob.* 264. *Fon.* 304. *Vide Cro. El.* 286. *cont.*

But it was not helped before the statute 18 *El.* 14. *Vide Hob.* 264. *Fon.* 304.

So the misprision of one original for another is aided; for it is but form: As, *summonitus*, for *attachiatus*. *Semb.* 2 *Cro.* 108. *Cro. Car.* 91. *Dub.* 1 *Sid.* 423.

So the default of a *disfringas* shall be aided. *Sal.* 454.

But a suit upon a penal statute in *B. R.* by bill, where by the *fl.* 18 *El.* 5. it ought to be by information or original, is not helped. *R. Cro. El.* 77.

So *attachiatus*, for *summonitus* in an inferior court is not aided; for the statute does not extend to it. *R.* 2 *Cro.* 108.

So the default of a plaint in an inferior court, though in the nature of an original, shall not be aided. *R.* 1 *Sal.* 266.

[If there is verdict and judgment in an inferior court, on an improper plaint to support the action, it is no plaint at all; and where there is no plaint it is aided by *stat.* 18 *Eliz.* c. 14. *Soyer v. Curtis.* *P.* 10 *G.* 2. *B. R. H.* 367.]

Nor default of an original, or bill, and warrant of attorney, unless it be after verdict; for the statute 4 & 5 *Ann.* 16. does not extend to it. 2 *Mod. Ca.* 285.

Nor shall be filed, after error for this cause, and a certificate by the chief justice, that none is filed. *R.* 2 *Mod. Ca.* 284, 369.

[The court of chancery will not order the filing of an original, *nunc pro tunc*, to make good a judgment on error brought, without some excuse for not filing it before, though a slender one may suffice. *Anon. T.* 1734. 3 *P. W.* 314.]

(D. 7.) Small Variance.

So a variance between the writ and count in a small matter, was amendable before the *fl.* 21 *Jac.* 13. As *Whorewood* in the writ was *Horewood* in the count, and amended; for it is the same in sound. *R.* 1 *Rol.* 199. *l.* 30.

So an immaterial omission, as, *ad valentiam*, in *trover*. *R.* 2 *Cro.* 654.

So now, by the *fl.* 5 *G.* 13. After verdict, judgment shall not be stayed or reversed, for any defect in form or substance, in any bill, writ, original, or judicial, or any variance in such writs from the declaration, or other proceedings.

(D. 8.)

(D. 8.) But not a material Variance.

But a material variance between the bill, or original, and the declaration is not aided. *Vide Pleader*, (C. 14.)

Yet by the *ſt.* 5 *G.* 13. After verdict, no judgment ſhall be ſtayed or reverſed in any court of record for any variance in any writ from the declaration, or other proceedings.

Yet if upon diminution alledged, the original certified be in one county, where the action was in another, it ſhall not be intended the original in the ſame cauſe; but rather that there was no original, and that is aided. *Cont. R.* 2 *Cro.* 479. *R. acc.* 2 *Cro.* 655. *R.* 2 *Cro.* 674. *Court div^d.* *Lat.* 225. *R. Pal.* 394. *Dub. Pal.* 428.

So if the original certified be of a former term, and other parties. *R. Cro. Car.* 327.

But where the original certified varies only in the name of the party, it ſhall be taken for the original in the ſame cauſe, *R.* 2 *Cro.* 185. *Yel.* 108.

So if it varies only in the time of the action, *R. Cro. Car.* 272, 282.

(D. 9.) Nbr Ignorance of the Clerk, or Miſinformation.

So ignorance of the clerk, or default of true information, ſhall not be amended. *Vide poſt*, (V. 1, 2.)

So a falſe date, or miſpriſion in it; as *duodecno*, for *duodecimo*. *R.* 1 *Lew.* 2.

[Yet an extent teſted *undecimo*——omitting the month, was amended. *Rex v. Powel*, in *Sc^r. M.* 1721. *Bunb.* 83.]

So if the date in a writ of covenant for a fine be after the *dedimus* for the caption of the fine. *R.* 1 *Sal.* 52.

If there be not 15 days between the teſte and return; for it does not proceed from the miſinformation of the client, *R. Sho.* 80.

If a *ſcire facias* upon a judgment in ejection be *de duobus meſſuagiis* and the judgment was *de uno meſſuagio*. *R. Sal.* 52.

(E) Warrant of Attorney.

(E. 1.) When Failure, or Miſpriſion in it ſhall be Error.

BY the *ſt.* 8 *H.* 6. 12. Judges may examine and amend in affirmance of judgment, a miſpriſion of the clerk in a warrant of attorney.

And by the *ſt.* 18 *El.* 14. After verdict, no judgment ſhall be ſtayed or reverſed for want of a warrant of attorney.

Nor by the *ſt.* 21 *Jac.* 13. By reaſon, that the plaintiff in ejection or other perſonal action, being an infant, appeared by attorney,

* Where

* Where an attorney *undertakes* to appear for an infant defendant, the court will order it to be done in a proper manner, and where it has been done *per attornatum*, it will be amended to *per guardianum*. *Str.* 114. *

* But not where there is no *undertaking*, especially after error brought. *Str.* 445. *

So by the *fl.* 4 & 5 *Ann.* 16. All these defects but want of warrant of attorney, are helpt after judgment by confession, *nil dicit*, *non sum informatus*, or after writ of enquiry executed.

By the common law, the default of entry and filing his warrant of attorney would be error. *Dy.* 180. *a.* 225. *a.* 330. *a.* 363. *a.*

So a misprision in a warrant of attorney.

So now, since the *fl.* 4 & 5 *Ann.* 16. Judgment by *nil dicit*, or *non sum informatus* will be erroneous, unless there be a warrant of attorney duly filed.

(E. 2.) When not.

But if a warrant of attorney was filed, though not entered, it will not be error.

So if it was filed of any term. 2 *Cro.* 277.

So for avoiding error, the court will give liberty to file it at any time before judgment. *Vide Attorney*, (B. 8.)

In *C. B.* the warrant of attorney shall be filed upon a distinct file. 1 *Sal.* 88.

In *B. R.* it was entered upon a particular roll till *Jac.* 2. when *per Wright, Ch. J.* it was ordered to be entered upon the top of the plea roll. *Ibid.*

So a warrant of attorney shall be amended; if it was, *A. ponit loco suo B. attornatum suum*, where it ought to be, *A. executor of C.* for it shall be intended a warrant in the same action, when no other is depending. *R.* 2 *Cra.* 135. 1 *Rol.* 289. *l.* 25.

* So the *name* of the attorney in the plaintiff's warrant, may be altered so as to make it correspond with that in his declaration, after error brought, and the *variance* assigned for error *et vice versa*. *Doug.* 115, 116. *

* So, the surname of attorney in declaration to make it correspond with the warrant after error. *Id. Ibid.* *

[If defendant filed *bailiff bugi*, instead of *burgi*, it may be amended after error brought. *Philips v. Smith.* *M.* 5 *G.* *Str.* 136.]

So a default in the declaration by omission of the words, *per attornatum suum*, may be amended by the plea roll. *R.* 1 *Sal.* 88.

(F) Panel.

BY the *fl.* 8 *H.* 6. 12. Judges may amend, &c. a misprision of the clerk in any panel, &c.

If a man rightly named in the *venire facias* and *babeas corpora*, was mistaken in his surname in the panel to the *babeas corpora*,
and

and so sworn, it shall be amended, if upon examination it appears to be the same person returned. *R. 1 Rol. 196. l. 40. 197. l. 40. 55. R. 5 Co. 42. b.*

So if he was mistaken in his Christian name. *R. 5 Co. 42. b. Codwel. 1 Rol. 198. l. 5. Jon. 448. Cro. Car. 563.*

[The court will *ex officio*, and against the will of defendant, amend the Christian name of a juror who acknowledges he was the person summoned. *Rex v. Roberts, M. 18 G. 2. Str. 1214.*]

So if the sheriff annex the panel for one action, to the *disfringas* for another, it shall be helped; for it shall be as a default of the writ of *disfringas*. *R. 2 Cro. 369. 3 Bul. 179.*

So if a man rightly named in the *venire* be named in the *disfringas* by a name of the like sound, though different spelling, it will be well: As *Stoke*, for *Stech*, *Hastin*, for *Hastings*, &c. *Semb. 2 Rol. 168.*

So if a name be mistaken in the *disfringas*; as *Baskerfield*, for *Baskervill*, it may be amended without examination of the sheriff by the *st. 8 H. 6.* as a misprision of the clerk; for the *venire* is the warrant for the *disfringas*. *Semb. 2 Rol. 168.*

Or in an *habeas corpora juratorum*: as the executrix of *H. Wade*, for *W. Wade*. *R. Cro. Car. 32.*

But if he was not returned by the sheriff, it shall not be helped: As if twenty-three are returned in the *venire facias*, and in the *habeas corpora*, the twenty-three and also another are named, and the other is sworn; it shall not be helped. *R. Jon. 392.*

(G. 1.) Return.

By the *st. 8 H. 6. 12.* Judges may amend, &c. a misprision of the clerk in any return.

By the *st. 8 H. 6. 15.* A misprision or default in the return of any process made by sheriffs, coroners, bailiffs of franchises, or any other, &c. in a letter or syllable too much, or too little.

So if an annuity be returned, *nihil per quod attachiari potest*, where it should be, *per quod summoniri potest*. *Kil. 279. b.*

If four names are omitted in the return of the *disfringas*, which were in the *venire*, upon a proof, that they were distrained. *Ibid.*

If the sheriff upon the *disfringas jurat'* return too small issues it shall be amended. *Ibid.*

Or if he return issues upon a man not named in the *disfringas*. *Ibid.*

But an omission of the return shall not be amended: *R. 5 Co. 41. b.* as if the *habeas corpora* be *album breve*. *R. Mo. 868.*

Nor an omission of the name of the sheriff, before the *st. 21 Jac. 13.* *R. 2 Cro. 188. R. 5 Co. 41. b.*

Nor a return by the sheriff, where it should be by the coroners, or *à contra*. *R. 5 Co. 36. b. Tel. 15.*

And

And by the *st.* 18 *El.* 14. After verdict, no judgment in any court of record shall be stayed or reversed, by reason of any imperfect or insufficient return.

Nor by the *st.* 4 & 5 *Ann.* 16. After judgment by confession, *nihil dicit, non sum informatus*, or when a writ of inquiry is executed.

If the return upon a *venire facias* was right, but the return upon the *habeas corpora* or *disfringas* was defective, it was amendable by the *stat.* of 18 *El.* 14. 1 *Rol.* 204. l. 30.

So if there was no return upon the *habeas corpora* or *disfringas*; for the *venire facias* is the principal process. *R.* 1 *Rol.* 204. l. 15, 25.

[If there is no return to the *disfringas*, but the panel is annexed to it, that is a good return; or else *semb.* it shall be considered as a bad return, and is therefore amendable. *French v. Wylshire*, *M.* 11 *G.* 2. *Andr.* 67.

Or the name of one coroner only to the return, where there are many. *R.* *Hob.* 70.

Or no pledges for the jurors. *R.* 2 *Cro.* 534.

So, if upon a suggestion of a *devastavit* by two executors, the sheriff returns an inquisition as to one, and says nothing as to the other, it shall be amended; for it was only an insufficient return. *R.* 1 *Sal.* 363.

So, if the return be only to part of the writ. *R.* *Cro. Car.* 312, 13.

But if there was no return upon the *venire facias*, it was not amendable 'till the statute 21 *Jac.* 13. *R.* 1 *Rol.* 204. l. 10.

So now, if the sheriff makes no return to a *scire fieri* inquiry, against an executor upon a *devastavit* suggested, it shall not be amended. 1 *Sal.* 363.

[If two inquisitions on two extents are taken before the same jury at the same time, who find effects to such a value, and to each annex the like schedule, and the sheriff returns on each, that he had seized goods to that value (whereas he had seized on but one) he shall not be allowed to amend. *Rex v. Ward*, *M.* 1732. *Bunb.* 323.]

[The want of a return is cured by the appearance of, and trial by a proper jury. *Phillips v. Phillips*, *T.* 11 & 12 *G.* 2. *Andr.* 248.

[If the king dies between the teste and the return of a writ of seisin on a common recovery, and the return is made *anno infra scripto*, it shall be amended as misprision of the clerk, without rule to shew cause. *Watson v. Lockley*, *H.* 26 *G.* 2. 2 *Wilf.* 2.]

[Return of *hab. corp. jurat.* may be amended after trial. *Barnes* 5.]

[Return of *re. fū. lo.* not to be amended by adding pledges, if not recorded below. *Barnes* 8.]

[Return of *venire* is amendable. *Barnes* 11.]

[Return of writ of *seisin.* *Barnes* 23.]

[Of *hab. corp. cum causa*, by inserting a custom ; at the desire of the court returning. *Barnes 23.*]

(G. 2.) Misprision in the Name of a Juror.

By the *fl. 21 Jac. 13.* After verdict, &c. no judgment shall be stayed or reversed, for that any juror who tried the issue is misnamed in surname or addition on the return of the *venire facias*, *habeas corpora*, or *disfringas*, so as upon examination it be proved to be the same man, who was meant to be returned.

Or, for that there is no return of the said writs, so as a panel of the names of the jurors be returned, and annexed to the said writs.

Or, for that the sheriff or other officer's name is not set to the said return, so as the writ be proved to be returned by the sheriff or other officer.

Nor by the *fl. 16 & 17 Car. 2. 8.* for that the sheriff's name is not returned upon the original writ.

Or, for that no pledges, or but one pledge, is returned on the original writ, bill, or declaration.

And by the *fl. 4 & 5 Ann. 16.* These imperfections are aided after judgment by confession, *nihil dicit*, *non sum informatus*, or upon which a writ of inquiry is executed.

If the name of a juror was mistaken in the return, the sheriff might come into court and amend it. *1 Rol. 196. l. 51.*

But 'till the *fl. 21 Jac. 13.* The court could not amend after the death of the sheriff. *R. 1 Rol. 196. l. 45.*

So a misprision in the vill where the juror was, between the *venire* and *disfringas*, was not material. *R. 2 Cro. 353, 457, 654. R. 1 Rol. 197. l. 25.*

Nor a misprision in the surname, where they were of the same found. *R. 2 Cro. 354.*

Nor, a misprision in the surname, where it was the same person. *R. 2 Cro. 457.*

Nor, an abbreviation in the Christian name: As *Francus*, for *Franciscus*, in the *venire facias*. *R. 2 Cro. 534.*

(H) Venue.

(H. 1.) From what Neighbourhood the Jury shall come.

BY the *fl. 21 Jac. 13.* After verdict, no judgment shall be stayed, or reversed by reason the *venue* is in some part misawarded, or sued out of more or fewer places than it ought, so as some one place be right named.

Nor, by the *fl. 16 & 17 Car. 2. 8.* for that there is no right venue, so as the cause were tried by a jury of the proper county or place, where the action was laid.

By the common law, the jury ought to come out of the neighbourhood of the parish, town, hamlet, or place known out of a town,

town, &c. which was nearest, or in which the matter to be tried was alledged by the record. *Co. L. 125. a.*

And therefore, if a matter be alledged, within a parish in such a county or city, &c. the jury shall come from the neighbourhood of the parish, for that is more certain than the city, &c. and it shall be intended to comprehend but one town, unless the contrary appears. *Co. L. 125. b.*

If it be alledged within a manor, the jury shall be *de vicineto* of the manor. *Co. L. 125. b. R. Jon. 320.*

If it be alledged in *H.* and afterwards in the parish of *H.* aforesaid, the venue shall be from *H.* for it shall be intended the same place. *R. Hob. 6.*

If there be an obligation to *B.* in *London* with condition, that *A.* go from *Tork* to *London*; and issue upon this, the venue shall be from *London.* *R. 2 Cro. 137, 150.*

If an offence be alledged in an information at *G.* in *Kent*, the venire ought to be awarded from *G.* *R. Hard. 19.*

If it be alledged in *King-street*, &c. in the parish, or manor, &c. of *A.* the jury shall be from the neighbourhood of *King-street*; for every place alledged generally shall be intended a town, if nothing be added to declare the contrary, and then this will be more certain than the parish, manor, &c. *Co. L. 125. b.*

In ejectment, if the lease be at *M.* for land in *L. M.* upon Not guilty, the venue shall be from *L. M.* *Cro. El. 701.*

So, if a matter to be tried, be alledged in several towns, the venue shall be from all: As, if a prescription be traversed for a way from *B.* to *C.* and so to *D.* the venue shall be from *B.* and *C.* *Jon. 2.*

If the issue be, whether land in *A.* be within the manor of *B.* the venue ought to be from the manor, and from *A.* for it ought to be as large as the inquiry upon the issue to be tried. *1 Sid. 19. R. 2 Cro. 8.*

So, where trespass is upon land in *A.* and the defendant pleads Not guilty to part, and to the residue justifies for tithes, as rector of *B.* within which *A.* lies. *R. 2 Cro. 87.*

If a trespass be supposed at *W.* and the defendant justifies by warrant at *B.* and the issue be upon the *de son tort*, &c. the venue shall be from *W.* and *B.* *R. 2 Cro. 43, 95.*

But where a prescription is not directly in issue, the venue shall be from one town only. *R. Jon. 2.*

So the venue shall not be larger than the issue: As, if the issue be comprized within the manor, it shall not be from the manor and town. *1 Sid. 19.*

(H. 2.) From what Neighbourhood the Jury shall not come.

But by the common law, the jury shall not come *de vicineto* a forest. *Lane 33.*

Or, of an honour. *Semb. 1 Sid. 20.*

Yet a forest, &c. shall be intended in a parish, and a *venire* from it will be good, if the defendant does not plead in abatement, and pray whether he shall answer, unless the plaintiff alledges in that parish the forest lies. *R. Lane. 33.*

So in many counties a ward is allowed for a parish. *R. Cro. 222.*

So it shall come from a castle, which is a distinct place from a town. *R. 2 Cro. 239.*

So, if a matter be alledged in *platea de King-street in the parish B. in civitate Westmonast.* the jury shall be from the neighbourhood of the parish; for *platea* is not a town, hamlet, or place known out of, which the jury shall come. *Co. L. 125. a.*

But now by the *st. 4 & 5 Ann. 16.* Every *venire facias* for trial any issue in any of the courts of *Westminster*, shall be awarded the body of the proper county.

Yet this does not extend to a *venire facias* in an information at the suit of the king.

But by *st. 3 G. 2. c. 25.* which enacts there shall be but one return to try all the issues at the assizes, that proviso is usually repealed. *French v. Wiltshire, H. 11 G. 2. Andr. 99. 1085.*

And now by *st. 24 G. 2. c. 18. s. 3.* It is expressly enacted that actions and informations or penal statutes shall with respect to the venue be put on the same footing with other actions.*

So in an appeal by a jury of two counties, the jury shall come *ex parte comitis*. *Dy. 46. a.*

(H. 3.) When Misprision of the Venue is helped.

By the common law, if a *venire facias* was awarded of an improper venue, it was error.

And was not aided by consent of parties. *Hob. 5.*

But now, since the *st. 21 Jac. 13.* it shall be helped after verdict, if the venue be only from one, where it ought to be from several places if that one be such a place, from which the venue might come. *R. 1 Sid. 20.*

So, if the venue be only from one, though there are several counties in several counties. *R. 2 Lev. 178.*

So, where by the custom of *London* the jury ought to come from the four next wards, if they come from four wards, two of which appear to be next to the place, it shall be helped. *Sand. 258.*

So, where a covenant was brought in *London*, the defendant's performance by enjoyment of a walk in the county of *N.* the trial be by a jury from the neighbourhood of the walk in *N.* it will be good after verdict, though no venue can come from the walk, and the action was brought in *London*; for the county of *N.* was the proper county for this issue. *R. per 3 J. 1. 207. 1 Sid. 326.*

So,

So, in an action for slander in *London*, and the defendant justifies at *Oxford*, and it be tried at *London*, it shall be helped. *R. 3 F. 1 Sand. 248. R. 1 Vent. 263.*

So, in debt in *London* for rent of land in *Essex*, and an exception pleaded. *R. 3 Lev. 394.*

So, in covenant upon a demise of land in *Berwick*, and compulsion is to be tried, if the trial be upon a venire to the nearest county to *Berwick*, it shall be helped, as well as if it be in *B. Semb. 1 Mod. 37. 1 Vent. 58, 90. 1 Sid. 381. 2 Lev. 164.*

But if an action be brought in *London*, and the matter of the issue arise in *Oxford*, or any other county, and the trial is by jury of *London*, it shall not be helped; for it is not the proper county. *Semb. Dan. 456. 2 Mod. 24. But by the cases supra Semb. cont. Semb. acc. 1 Mod. 199. R. 2 Lev. 122. R. 1 Show. 344.*

[*London* in the margin, *Oxford* in the body; venire awarded sheriff, in plural; after trial in *Oxfordshire* amendable to sheriff in singular. *Barnes 484.*]

*The venue may be changed by motion to amend. *1162, 1202.**

(I) Miscontinuance and Discontinuance.

By the *st. 32 H. 8. 30.* After verdict judgment shall proceed notwithstanding any miscontinuance, discontinuance, &c. shall stand without reversal, as though no such default had been.

So, by the *st. 4 & 5 Ann 16.* Judgment by confession, *adit, non sum informatus*, or after writ of inquiry executed.

And therefore, where by the course of *B. R.* continuance ought to be entered after issue, before judgment, if judgment entered before the continuances, it shall be amended. *R. 1100. l. 5.*

So, if the defendant imparles and has a day given him by court, but *idem dies to the plaintiff*, is omitted, it shall be amended though it be after judgment against the defendant by *nil debet*. *R. 1 Rol. 205. l. 50.*

So, if a continuance omit, or mistake the name of the party or the day, or term to which the continuance was made, it shall be amended, if it appears to be by default of the clerk.

As if two defendants or plaintiffs appear, and a day is given only to one. *Cro. El. 619.*

Or, the entry is, that but one appeared, and a day is given to both, if it appears that the other did also appear. *R. Yd. 110.*

*So, where the original writ is returnable on a general return and the venire at a day certain, it is but a miscontinuance, and shall be helped by *st. 32 H. 8. c. 30.* though at the suit of the crown in civil suit. *Str. 62.**

*So, where the suit is by bill returnable on a day certain, and after judgment by default, the writ of inquiry is returnable on a general return. *Str.* 947.*

So, if a blank be for the day, to which the continuance was. *2 Mod.* 316.

So, it shall be amended, if the continuance be totally omitted. *2 Cro.* 528.

So, if the defendant by his plea does not answer to the whole point, or declaration, all is discontinued; but the discontinuance shall be aided. *Vide Pleader*, (E. 1.) *Dan.* 352.

So in debt for rent upon a copyhold and freehold, the defendant pleads, eviction by a devisee, the plaintiff *protestando*, that the copyhold was not devised, replies that the freehold was entailed, and therefore the devise void; and the issue upon the entail is found for the plaintiff, the discontinuance as to the copyhold is aided by the verdict as to the freehold. *R.* 3 *Lev.* 40.

And this statute extends to all discontinuances, as well after verdict as before. *R. Cro. El.* 489. *D. 2 Cro.* 211. 529.

And when there are several verdicts, as well as one. *R. Cro.* 528, 9.

So to discontinuances by the act of the court, as well as of the party. *R. 1 Sal.* 177.

So, in inferior, as well as superior courts. *R. 1 Sal.* 177.

So, to a discontinuance by the act of the plaintiff, as well as of the defendant. *R. 3 Lev.* 325.

But if the misentry of the continuance does not appear to be default of the clerk, but is the act of the court itself, it shall not be amended in another term: As if the continuance be not given to the parties, but to a stranger. *R. Cro. El.* 619.

Or if there are three defendants and but two appear, and a day given to all, if it does not otherwise appear that they did all appear. *R. Tel.* 155.

If the continuance be from *Easter* term to *Michaelmas* term, omitting a term. *R. Sti.* 339.

So a discontinuance shall not be amended after verdict, if the judgment was not given upon the verdict: As, in debt against the defendant, who pleads *riens per discent* except twenty acres in *D.* and the issue be upon assets also in *B.* and a verdict for the defendant, whereby the plaintiff takes judgment for twenty acres in *D.* *R. Tel.* 169. *2 Cro.* 236.

[Before judgment, discontinuances are the acts of the clerk; after judgment entered, and the record made up, they are the acts of the court. *Rex v. Ponsonby*, *T. 24 & 25 G. 2. Wilf.* 303.]

So if there be judgment upon a *retraxit* after a verdict. *2 Cro.* 211.

So if the judgment be not entirely upon the verdict; as, in debt for 20*l.* upon a bill, and 20*l.* upon a *mutuatus*, to which *sum informatus* is pleaded, and issue joined, and a verdict for the plaintiff as to the bill, and judgment for him for the whole. *R. Tel.* 169.

So

So if there be a demurrer for part, and a verdict for part, and judgment upon the whole. *R. 2 Cro. 304.*

[Continuances may be entered after error brought. *Phillips v. Smith, M. 5 Geo. Str. 136.*]

[But if the writ of error is quashed on continuances entered up after its *teste*, it shall be without costs. *Gould v. Coulthurst, M. 5 G. Str. 139.*]

(K. 1.) Record, Plea, &c.

By the *stat. 8 H. 6. 12.* Judges may examine and amend in affirmation of the judgment, all that to them seems the misprision of the clerk in any record, word, plea, &c. so that by such misprision no judgment be reversed or annulled, except in indictments, appeals, &c.

And by the *stat. 32 Hen. 8.* After verdict in any action real or personal, justices shall proceed to judgment, notwithstanding any mispleading, lack of colour, insufficient pleading, jeofails, &c. or other default or negligence of any party, counsellor, or attorney; which judgment shall stand without reversal, as though no such default had been.

By the *stat. 18 El. 14.* After verdict in any court of record, no judgment shall be stayed or reversed for want of form in the count, declaration, plaint, suit, or demand, except in appeals and indictments.

[A plaint levied in an inferior court before the cause of action accrued, is helped after a verdict, for *stat. 18 Eliz. c. 14.* extends to inferior courts. *Feathers v. Bryan, H. 21 G. 2. 1 Wils. 180.*]

By the *stat. 16 & 17 Car. 2. 8.* After verdict in any of the courts at *Westminster*, counties palatine, or great sessions, no judgment shall be stayed or reversed for default in form, or for the mistaking of the Christian or surname of the plaintiff or defendant, demandant or tenant, sum or sums of money, day, month, or year, by the clerk in any bill, declaration, or pleading, where the right name, surname, sum, day, month, or year in the same or any preceding writ, plaint, roll, or record is once truly alleged, whereunto the plaintiff might have demurred, and shewed the same for cause; but all such matters or any other of like nature, not being against the right of the suit, or whereby the issue or trial are altered, shall be amended, &c.

By the *stat. 4 & 5 Ann. 16.* All the statutes of jeofails shall extend to judgments on confession, *nihil dicit*, and *non sum informatus* in any court of record; and no such judgment shall be reversed, nor any judgment on any writ of enquiry executed be stayed or reversed, for any imperfection, omission, defect, matter, or thing which would have been aided after verdict by any of the statutes of jeofails, so as there be an original writ, or bill, and warrants of attorney duly filed.

[Entry

[Entry on record is amendable by the writs of *sci. fa.* and *certiorari*, after issue joined, on payment of costs. *Barnes* 3.]

[Record of *nisi prius* is amendable by plea-roll. *Barnes* 4.]

**Ld. Raym.* 95. 134.*

[If associate makes a wrong entry of verdict on the *poslea*, it may be amended. *Barnes* 6. 449.]

[Judgment-roll may be amended by inserting a date subsequent to first return of term. *Barnes* 7.]

[Record of *nisi prius* may be amended in the *jurata*, to make it agree with the writ formerly amended. *Barnes* 5.]

[An examination on interrogatories may be amended by a re-examination. The title of them may be amended after examination. *Barnes* 10.]

[The *jurata* at the foot of record having *trespass*, instead of *trespass on the case*, is helped by *jeofsails*. *Barnes* 11.]

[*Jurata* amendable by *hab. corp. jur. et venire*. *Ibid.*]

[The entry of a *hab. corp.* return and commitment, may be amended. *Barnes* 13.]

(K. 2.) What shall be said a Record.

The record contains the count, and all that is entered in the plea-roll. 8 *Co.* 157. *b.* 161. *a.*

*The memorandum may be amended and made of a particular day. *Ld. Raym.* 977.*

(L) When the Count shall be amended.

(L. 1.) In Form.

By the *ft.* 36 *Ed.* 3. 15. None shall suffer for want of the antient forms or terms in counts, so as the matter of the action be fully shewn.

So by the *ft.* 8 *H.* 6. 12. Misprision of the clerk, and by the *ft.* 18 *El.* 14. default of form, in the count shall be amended. But the *ft.* 32 *H.* 8. 30. does not extend to the count. *D.* 5 *Co.* 35. *a.*

And therefore the count having the substance is sufficient, notwithstanding any default in form, which may be amended. 1 *C.* 161. *a.*

[Declaration in trespass running by recital, may be amended on motion in arrest of judgment, by the bill, if right, and the court will not inquire when it was filed. *Wilder v. Handy*, *P.* 14 *G.* 2. *Str.* 1151. *Marshal v. Riggs*, *H.* 15 *G.* 2. *Str.* 1162.]

*And the court will give leave to file a new bill by which to amend. *Str.* 583.

*And the amendment may be after special demurrer and argument. *Str.* 954.*

[The

[The title of a declaration, as to the time of the delivery, may be amended according to the truth, on affidavit, without filing a bill to warrant it. *Symonds v. Parmenter*, T. 17 G. 2. *Wilf.* 78.]

[*Producit scdam*, to *petit remedium*, against attorney, on costs. *Barnes* 11.]

[On *clausum fregit* against defendant as administrator, amended to executor, after plea. on costs. *Barnes* 5.]

[Demise in ejectment cannot be enlarged or amended in point of time, without defendant's consent. *Barnes* 8-17.]

[If action by a remedial law is confined to *Middlesex*, declaration may be amended on plaintiff's motion, by changing *venue* after issue joined. *Barnes* 12. 488.]

[But not in other cases. *Barnes* 19.]

[Declaration against attorney, by inserting the true day of proclaiming, on costs, and leave to plead *de novo*. *Barnes* 17.]

[Pledges and memorandum added to make declaration agreeable to bill, on costs. *Barnes* 20. 356.]

[Mended from *prays suit*, to *prays remedy*, after demurrer for that cause, (by consent.) *Barnes* 167.]

*Where the declaration is amended, it is in the option of the defendant to have an imparlance or costs. *Str.* 950.

(L. 2.) In Substance.

So a defect in the count in substance shall be amended, where it proceeds from the misprision of the clerk; as, if the imparlance roll be mistaken, contrary to the instructions given. 1 *Rol.* 198. l. 15. *Hob.* 246.

If a declaration in assumpsit be, that he sold *tres virgatas*, *Anglice*, silk, omitting *serici*, where it was in the instructions. R. 1 *Rol.* 198. l. 45.

If a declaration in ejectment be filed, with blanks for the quantities of the land, &c. but the declaration delivered was right, and also the plea roll and *nisi prius* roll, it shall be amended; for the defendant was not deceived, the declaration delivered being right, and it was the default of the clerk, that he did not make the declaration filed perfect, when he had instructions to do it. R. 1 *Rol.* 207. l. 25.

So in debt against an executor who pleads *riens enter mains*, and the plaintiff replies, assets *die impetrationis billa scilicet*, and leaves a blank for the day, but the day is inserted in the paper-book, and *nisi prius* roll, the plea roll shall be amended. R. 1 *Rol.* 207. l. 35.

So, where in *trover* no place was inserted in the bill, nor a blank for it, but it was in the paper-book and the *nisi prius* roll, the bill was amended. R. 1 *Rol.* 207. l. 50.

So, if the time of the demise in an ejectment be after the verdict, by a mistake of the year, where the declaration delivered was good, it may be amended. *Dub.* 5 *Mod.* 333. cont. 1 *Sal.* 48.

So if the demise in an ejectment be expired before judgment, it may be enlarged. *Semb. 5 Mod. 333.* But not without consent. *1 Sal. 257.*

[If plaintiff declares as executor, on a promise to testator, and statute of limitations pleaded, and issue joined, plaintiff may on motion amend, by laying the promise as made to himself, on payment of costs, and liberty to defendant to plead *de novo*. *Executors of Duke of Marlborough v. Widmore, H. 4 G. 2. Str. 890.*]

So a declaration in *assumpsit* to pay 40*l.* if he procures an assignment of a term, omitting, that *A.* did assign the term, though it was in the writ; for that is sufficient for the information of the clerk. *R. Cro. El. 79.*

But where the day of the demise in an ejectment appears to be before the cause of action found by the special verdict, it cannot be amended. *R. Sho. 207.*

Vide Pleader, (C. 6.)

[Plaintiff declares on one demise, and after plea, adds demise of the trustees, and delivers new ejectment on the double demise; he shall not pay costs, but shall give notice where the lessors are to be found. *Short v. King, H. 12 G. 2. Str. 681.*]

[If on entry to avoid fine, demise is laid before entry instead of after, and plaintiff would be barred and put to bring a new ejectment; it may be altered on paying costs, though opposed. *Doe v. Pilkington. T. 9 G. 3. 4 B. M. 2447.*]

[The term in ejectment may be amended without consent from five to ten years. *Oates v. Shepherd, T. 20 G. 2. Str. 1272.*]

[Declaration in ejectment cannot be amended as to the parcels demised, without consent. *Kesworth v. Thomas, P. 11 G. 2. Andr. 208.*]

[Declaration in ejectment, that the said *James* (instead of the said *John*) entered, &c. cannot be amended, for it is in the nature of a process. Nor if he says lands in *A.* and *B.* or one of them, by striking out the disjunctive words. *Goodtitle v. Meymott, T. 17 G. 2. Str. 1211.*]

[It may be amended in *assumpsit* after a plea pleaded, by striking out 800*l.* and inserting 8000*l.* *Havers v. Bannister, H. 16 G. 2. Wilf. 7.*]

[The plaintiff's demand cannot be amended after verdict, judgment and error brought, however manifest the misprision may be. *Ray v. Lister, H. 12 G. 2. Andr. 351.*]

[Declaration in prohibition cannot be amended, if not warranted by suggestion or acts of spiritual court. *Barnes 7.*]

[Declaration against *James B.* reciting writ against *John B.* amended by rejecting the word *John*. *Barnes 11.*]

[By striking out *prochein ami*, plaintiff having attained full age. *Barnes 18.*]

[If the amendments are very long, yet if not matter of new title, and inserted in the rule, declaration may be amended, though withdrawn, to declare *de novo*. *Barnes 25.*]

[Declaration on bail-bonds amendable as others. *Barnes* 27, 114.]

Vide Pleader, (C. 6.)

*Declaration by the bye cannot be amended in plaintiff's name, for there is no writ by which to amend. *Lord Raym.* 771.*

*So, where a *scire facias quare executio non*, describes the record wrong, it is not amendable after *nul tiel record* pleaded, but must be discontinued. *Lord Raym.* 1057, 1059.*

(M) When the Plea, &c.

SO, if a plea, replication, &c. be defective in form, it shall be amended: as, if it contain surplusage; as, where plaintiff in the declaration alledges a trespass *ultimo die J. 1 Jac.* and in the replication, says *quoad transgress' prædicto ultimo die J. 5 Jac.* for, *1 Jac.* it shall be amended; for, *prædicto ultimo die J.* was sufficient and the addition of the year was surplusage. *R. 1 Rol.* 200. l. 20.

So a misprision of the name of the plaintiff, for the defendant, shall be amended. *R. 2 Cro.* 67.

As, in trespass by *A.* against *B.* who pleads *son assault*, and plaintiff replies, *de son tort absque causa per ipsum A. allegata*, where it ought to be, by the defendant *B. allegata*, it shall be amended. *R. Cro. El.* 752. *Vide post*, (O.)

So in debt the defendant pleads, *plene administravit*, the plaintiff replies, *quod prædictus A. habet bona, &c.* where it ought to be, *prædictus B.* it shall be amended after verdict. *R. 2 Cro.* 67. *Tel.* 65.

But the substance of the plea, &c. shall not be amended: as, if the defendant plead, *quod ipse A. B. dicit*, who is a mere stranger, and so no plea. *R. 2 Cro.* 13.

[Plea, on *scire facias* for the crown side, of not guilty, concluding with an averment, instead of to the country. *Rex v. Betts*, *H. 12 G. Str.* 686.]

[*Plene administravit* amended after two terms, on costs. *Barnes* 25.]

[By leaving out a special imparlance, and pleading tender of last term. *Barnes* 21.]

[Avowry after issue joined last term; by adding avowries for rents payable at different times. *Barnes* 21.]

[If to action for simple contract debt against executor, he pleads several judgments, and plaintiff replies *per fraudem*, defendant may amend before rejoinder, by striking out one of the judgments pleaded. *Stroler v. Heber*, *P. 12 G. 2. Andr.* 381.]

[Notice of a set-off (which by virtue of the statute is to be considered as a special plea) may be amended. *Edington v. Wilcox*, *P. 11 G. And.* 208.]

[If defendant plead the general issue, and forgets to give notice of a set-off, the court will give him leave to withdraw it, to deliver the same again with a proper notice of set-off. *Blackburn v. Matthias*, *P. 30 G. 2. Str.* 1267.]

[Notice

[Notice of set-off cannot be amended. *Barnes* 294.]

[But defendant may have leave to withdraw his plea, and to plead the same *de novo* with a new set-off. *Barnes* 308.]

[It may be amended by the draught signed by counsel after joinder in special demurrer. *Hutton v. Walker*, *M.* 3 *G.* 2. *Str.* 846.]

[Plea to a *quo warranto* may be amended after demurrer in the paper. *Rex v. Ellames*, *P.* 7 *G.* 2. *Str.* 976. *B. R. H.* 42.]

[After demurrer in the paper, called on and adjourned, plea of an executor may be amended by adding a *profert* of the letters testamentary. *Carpenter v. Davis*, *H.* 12 *G.* 2. *Andr.* 305.]

[After argument on demurrer, to state facts necessary to bring the merits before court; on costs. *Barnes* 20.]

[In information *quo warranto*, for acting as bailiff; if defendant pleads an election, and sets out the constitution of corporation, issue joined, cause sent down to assizes but not tried for want of time, he may amend his plea in setting out the constitution of the borough. *Rex v. Armstrong*, *H.* 11 *G.* 2. *Andr.* 109.]

[Plea in *replevin* amended after demurrer to it argued, and court ready to give judgment; on plaintiff's agreeing to strike out two servants made defendants, and costs. *Mattravers v. Fofset*, *T.* 12 *G.* 3. 3 *Wilf.* 295.]

[Whilst the pleadings are all in paper, replication may be amended from *de injuria sua propria*, to *molliter manus imposuit*. *Loew v. Newland*, *T.* 17 *G.* 2. *Wilf.* 76.]

[Replication may be amended after the paper book made up, by inserting record, of which *oyer* had been granted to defendant. *Symonds v. Parmenter*, *T.* 18 *G.* 2. *Wilf.* 97.]

[Plaintiff who by his attorney's mistake, has, in his replication traversed a lease under which he claims, may have leave to withdraw his replication, and reply *de novo*, even after six terms. *Alder v. Chip*, *H.* 32 *G.* 2. 2 *B. M.* 755.]

*The replication may be amended after verdict, by inserting the *similiter*, instead of, &c. *Cowp.* 407.*

[So, after demurrer, by setting out a *latitat*, and adding the continuances, on payment of costs. *Crocket v. Jones*, *M.* 13 *G.* 2. *Str.* 734. *Ld. Raym.* 1441.]

*But not, by altering the name of an officer in a justification in *replevin*. *Ld. Raym.* 310.*

[The court will not allow the plea to be amended after demurrer, when plaintiff has lost his trial. *Jordan v. Twells*, *M.* 9 *G.* 2. *B. R. H.* 171.]

[If defendant in *quare impedit*, pleads lapse of time, the court will not, after joinder in demurrer, give leave to amend and to plead defect of plaintiff's title; that is not to amend, but to make a new plea. *Wolferston v. Bishop of Lincoln*, *T.* 3 *G.* 3. 2 *Wilf.* 174.]

[Replication of *assets ultra* to a plea of specialty, in an action on simple contract, cannot be amended, after verdict found for the plaintiff, and set aside. *Bank of England v. Morice*, *M.* 8 *G.* 2. *Str.* 1002.]

[If defendant pleads two pleas, and issue is joined on one, and verdict for plaintiff, defendant shall not amend the other. *Barnes 25.*]

(N) When other Record. Fine.

If a note of a fine has the proclamations rightly entered, but at the foot of the fine, it be said, *the 13th proclamation*, for, *the 14th*, this shall be amended. *1 Rol. 198. l. 7.*

If a fine with the *custos brevium* varies from the fine with the chirographer, it shall be amended by it; for that is the principal record. *R. 3 Leo. 183.*

[Fine may be amended in form after error brought. *Barnes 216.*]

[Fine, by deed of uses, by adding a vill, though forty years afterwards. *Barnes 24. *Ld. Raym. 209.**]

[Of lands in *Antegoa in America*, in *partibus transmarinis* amended by striking out these words. *Barnes 216.*]

[A fine though levied above fifty years, may be amended in the name of the parish, on reading the deed and affidavits, without rule to shew cause. *Boboun v. Burton, P. 10 G. 3. 3 Wils. 58.*]
Ld. Raym. 134.

[A common recovery amended on affidavit of the vouchee by adding a parish not named in the recovery nor in the deed to lead the uses. *Henzel v. Lodge. H. 11 G. 3. 3 Wils. 154.*]

[But if a fine is levied as of *Trinity Term* of lands in which the conuser had nothing 'till *Trinity* vacation, this cannot be altered and made a fine of *Michaelmas Term*, though in the deed to lead the uses it was so covenanted: for this is not to amend, but to make a new fine. *Case of Wilmot late C. J. M. 12 G. 3. 3 Wils. 249.*]

So, if a record removed by *certiorari* out of *London* be mistaken, it may be amended; for only the tenor of the record is removed, and therefore the return may be amended by the original. *i Sid. 155, 230.*

If the *poslea* be *quod jurat' ponit' in respect' in placito terr' inter'*, &c. where it ought to be *in placito debiti*. *R. Jon. 302.*

(O) Issue.

By the *st. 32 H. 8. 30.* after verdict justices shall proceed to judgment any misjoining of issue notwithstanding, and such judgment shall stand without reversal, &c.

So, by the *st. 4 & 5 Ann. 16.* after writ of inquiry executed.

And therefore, if the defendant pleads to issue, *et prædictus def. similiter*, where it was intended, *prædictus querens*, this shall be amended. *R. 1 Rol. 200. l. 2, 25. Adm. 2 Cro. 587. R. Skin. 591. Vide ante, (M) post, (T. 2.)*

[If the record is *et prædict' querens* (instead of *defendens*) *similiter*, it is aided. *Rawbone v. Hickman, P. 9 G. Str. 551.*]

[Issue amended by inserting king's name. *Barnes 18.*]

So, if the defendant *quod vi & armis* says, *quoad est inde culpabilis*, where it was intended *quod non est inde culpabilis*, this shall be amended. *R. 1 Rol. 200. l. 10.*

If the *similiter* be omitted in the joining of the issue. *2 Rol. 59.*
Str. 641. cont.

So it is helped if the defendant says, *quod solvit* 14 Jun. 11 Jac. and plaintiff replies, *non solvit prædict.* 14 Aug. and so mistakes the month. *R. 2 Cr. 550.*

Or, if he says, *quod devastavit*, without saying, who *devastavit*, *R. Cro. Car. 93. Lit. 52.*

So, if the defendant plead, *not guilty*, for, *non assumpsit*. *R. Cro. El. 470. R. 1 Brownl. 8. Al. 77. R. cont. Pal. 393.*

Or, *nil debet*, for *nil detinet*. *R. al. 76.*

So, if issue be joined upon a bad and void plea, it is aided after verdict. *R. Cro. El. 455. 2 Cro. 312. Dan. 356.*

As, if a man pleads a grant of rent, without attornment, and the issue is upon the grant, and it is found against the defendant. *Semb. Cro. El. 259.*

So, if he pleads a surrender without an agreement to it, and the issue is upon the surrender, and it is found against the defendant. *D. Cro. El. 259.*

So, if he pleads a devise without an assent of the executor, and the issue being upon the devise, that is found. *D. Cro. El. 259.*

So, if he pleads a concord, without satisfaction. *R. Cro. El. 259, 778.*

So, if he pleads acceptance, or payment to an obligation, without deed, and the issue thereupon is found against the defendant. *R. Cro. El. 260. R. Cro. El. 455. 5 Co. 43. a. Mo. 692.*

So, if a tenant in dower being feoffee pleads detainment of charters, and the issue thereupon is found for the demandant. *Dub. Cro. El. 367.*

So, if the defendant pleads a prescription, which is not well pleaded, and issue upon it is found against the defendant. *R. Cro. El. 445, 6. R. Hob. 113.*

So, if he pleads a void prescription. *Dub. Cro. El. 227, 8.*

If the plaintiff replies, *administravit aut aliter disposuit*. *R. Hob. 49.*

If a plea be double, and issue joined on both parts. *R. Mo. 574. Semb. Hard. 40.*

If the issue be upon the delivery of a deed to the party himself as an escrow. *R. 2 Cro. 86.*

So, if an issue be on a bad and insufficient replication, it shall be aided. *R. Tel. 228.*

So, if an issue be upon a negative pregnant, it is aided after verdict. *R. 2 Cro. 576. R. 2 Cro. 87.*

Or, without an express negative and affirmative. *Dan. 354.*

So it shall be amended, if the issue be joined by different words; as if the plaintiff assigns a breach of covenant, *quod non trans-*

transposuit a term for years, and defendant says, *quod assignavit*. R. 2 Leo. 116.

So it shall be aided, if the issue be joined upon an immaterial point. D. Hard. 40, 43, 69. Ray. 458.

As, upon an immaterial traverse. R. Tel. 54. 2 Cro. 44.

[In action of assault against A. and B. A. confesses, and B. pleads that he and A. is not guilty, if issue is joined, and verdict finds B. guilty, it is well, otherwise if it had found all the defendants not guilty, for it would have been an immaterial issue. Hill v. Fleming, M. 10 G. 2. B. R. H. 341.]

If an obligation be to pay upon 31 Sept. (which is impossible) and defendant pleads *solvit ad diem*, upon which issue is joined; for it is payable presently; and if no payment is proved, it shall be intended that it was not paid. R. Lat. 158.

So, if defendant justifies, but the plea is bad, yet the issue upon it is found for the defendant, it shall be aided. R. 2 Cro. 251. R. 5 Mod. 227.

So in a *quare impedit*, if the bishop casts an essoin, in which there is a defect, and another defendant pleads to issue, after verdict for the plaintiff, the plea of the bishop shall be amended. Semb. 2 Cro. 93.

So, if there be no issue joined; as, in an indictment for a nuisance, the defendant pleads *non culp. et prædictus A.* (who was the clerk of assize) *qui, &c.* is omitted. R. 2 Cro. 502. Vide infra cont.

So in an ejectment against seven defendants, and the plea roll, *venire, distringas*, and *jurata* were right, but the *nisi prius* roll names only five defendants, it shall be amended after verdict, though the issue be altered by it. R. 1 Sal. 48.

But an issue upon a plea merely void and nugatory is not aided by the statute after verdict: as, in debt, or *assumpsit*, if the defendant pleads not guilty, and the issue is upon that. Semb. Cro. El. 778. R. 2 Rol. 368.

If defendant pleads *de injuria sua propria*, without saying, *absque tali causa*. 1 Sid. 341. Hard. 40. Vide Pleader, (R. 12, 13.)

If no issue at all is joined. 2 Mod. Ca. 376. *Vide supra cont.*

Nor, an issue totally misjoined. Semb. Cro. Car. 94.

Nor an issue misjoined in the very point to be tried: as, if the defendant pleads, *solvit ad diem 20l.* Plaintiff replies, *non solvit prædict'* 30l. R. 2 Cro. 586. R. Cro. Car. 593.

In debt on an obligation for 10l. 10s. defendant pleads, *solvit prædict'* 10l. and issue thereupon is for the plaintiff; is not aided. R. Hob. 113.

In *assumpsit*, to find meat, &c. for plaintiff's wife and servant for three years, when the plaintiff would require it. Defendant admits the promise for the wife for three years, but traverses the promise for the servant; plaintiff replies, that he promises, &c. for three years next following, and there is issue upon this; it is not aided, for it is no issue upon the *assumpsit* traversed by the defendant. R. 3. Leo. 66.

So

So, if by the issue found it does not appear, that the plaintiff had a cause of action, it shall not be aided by statute: as, in trespass for a battery, the defendant pleads *molliter manus* in defence of his possession, the plaintiff makes a bad prescription for a way, and there is issue upon this, which is found for the plaintiff; it shall not be aided. *R. Hob. 112. Mo. 867.*

In debt upon an obligation with condition to pay 25 *Jun.* the defendant pleads payment 20 *Jun.* and the issue upon it is found *quod non solvit*; for perhaps he paid upon the 25 *Jun.* *R. 2 Cro. 434, 5.*

So the statute 32 *H. 8. 30.* does not help, where there is not a verdict upon the special matter, though there be a verdict upon the *vi & armis*.

So a discontinuance in a *replevin*, where the plaintiff is non-suited after evidence, though the jury assess damages, is not helped; for as to that, it is but an inquest of office. *R. Cro. El. 339, 412.*

Nor, if the issue be upon *nul tiel record.* 11 *Co. 8. a. 2 Cro. 304.*

Or, between demandant and vouchee. *Semb. Dan. 352. Cont. per Hob. 281.*

So, if the judgment is not given upon the verdict. *Dan. 352.*

(P) Verdict.

If a verdict finds for the plaintiff 220*l.* damages 12*d.* and costs 6*d.* in an action on the statute of *Winchester*, where the whole ought to be given in damages, this shall be amended; for the intent appears. *R. 1 Rol. 203. l. 30.*

So, if a special verdict be entered, contrary to the notes found at the assizes, it shall be amended. *R. 4 Co. 52. b. 2 Rol. 701. l. 15. R. 1 Rol. 82. Adm. Cro. El. 112, 150. 1 Sal. 47, 53.*

*So a special verdict, that a bankrupt bought and sold great quantities, may be amended as to the quantities, on affidavit, that they were proved at the trial. *Str. 514.**

[A special verdict on an information for importing brandy by defendant's testator, mistaking the time, may be amended by the minutes after one argument. *Attorney-General v. White, T. 1730. Bunb. 283.*]

So, if the judge of assize remembers, that the verdict was contrary to the entry upon the *postea.* *Cro. Car. 338.*

[Verdict given for 274*l.* 1*s.* but entered by the clerk of *nisi prius*, only 1*s.* on the *distringas*, may be amended by the judges notes. *Newcombe v. Green, M. 17 G. 2. Str. 1197. Wilf. 33.*]

*So, where there is a general verdict, and entire damages, on several counts, some of which are bad, and evidence applicable only to the good counts, the verdict may be amended by the judges notes, and entered for plaintiff only on good counts. *Doug. 746.**

So it may be amended by the notes of the counsel in the cause. *1 Sal. 47, 8, 53.*

Or, proof of the evidence there given. *R. 2 Mod. Ca. 49.*

So.

So, if a general verdict be given, and it is entered by words tantamount, it shall be amended. *Semb. Cro. El. 866.*

So, if the verdict be for the plaintiff or defendant generally, and there be a misprision in the entry, it shall be amended. *R. 2 Cro. 185. Tel. 186.*

So, if the damages upon the *poslea* are intire, when the judge directed they should be several. *R. Carth. 146.*

So the *poslea* shall be amended by the entry by the clerk of assize, upon the pannel. *R. Popb. 102.*

So surplusage in a verdict shall be rejected, as surplusage. *2 Sand. 308.*

Though it be an indictment for barrettry, or other crime. *Ibid. Vide Pleader, (S. 28.)*

*If there be two issues, and the foreman give a verdict for defendant generally, when it was the intention of the jury to give one for the plaintiff, and the other for the defendant, it may be amended on affidavit of eight of the jury. *1 Bur. 383.**

But a verdict shall not be amended after it be returned into court. *R. Cro. El. 112. Cont. Cro. Car. 338.* And it was amended by *B. R.* after error brought, and the record removed thither. *2 Cro. 185.*

And after error, and the record removed, on payment of costs to be taxed in *B. R.* *2 Jon. 212.*

So a verdict shall not be amended in a matter of fact; for this may subject the jury to an attain. *R. Cro. El. 776.*

As, if a declaration be, *12 Jan. 45 El.* and the record of *nisi prius* be *de transgression* *12 Jan. 25 El.* after verdict for plaintiff it shall not be amended. *R. Mo. 681.*

So if the record of *nisi prius* be *à die Sancti Trinitatis in tres septimanus nisi A. 27 Jun. prius venerit*, which is the day after the day in bank, which was mistaken for, *à diè Sancti Michaelis*, it shall not be amended; for the judge tried the cause without authority. *R. Carth. 506.*

So, if the verdict finds absolute damages upon a plea, to which there was a demurrer, and conditional damages upon a plea, upon which there was an issue, and judgment accordingly. *R. Cro. Car. 32.*

So a verdict shall not be amended in criminal cases. *Vide post (2 C. 1.)*

(Q) Averment.

BY the *st. 21 Jac. 13.* after verdict, no judgment shall be stayed or reversed for lack of any averment of any life or lives of any, so as he or they be proved to be living.

By the *st. 16 & 17 Car. 2. 8.* after verdict, no judgment shall be stayed or reversed for want of alledging the bringing into court any bond, bill, indenture, or other deed mentioned in the declaration, or other pleading: or letters testamentary, or letters of administration.

Or, for the omission of *vi et armis*, or *contra pacem*.

Or,

Or, for want of the averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or *prout patet per recordum*.

But all such omissions, or other of like nature, (not against the right of the matter in suit, nor whereby the issue or trial are altered, &c.) shall be amended.

And therefore, in ejectment, where the plaintiff declares upon a lease for years, *if A. so long live*, and does not aver the life of *A.* it was amended by the court. 1 Sid. 61.

And by the *st.* 4 & 5 Ann. 16. all such omissions, defects, &c. as are aided after verdict by any of the statutes of jeofails, are aided after judgment on confession, *nil dicit, non sum informatus*, or when a writ of inquiry is executed in any court of record.

So in other cases an averment shall be aided by the statutes of jeofails.

As, if a man justifies in trespass upon a prescription for common for beasts *levant and couchant*, and does not aver, that his beasts were *levant and couchant*, it shall be aided after verdict, *R.* 2 Cro. 44.

(R) Judgment.

BY the *st.* 16 & 17 Car. 2. 8. no judgment after verdict, confession *per cognovit actionem*, or *relicta verificatione*, shall be reversed, for want of a *misericordia*, or *capiatur*, or for that a *misericordia* is entered for a *capiatur*, or *vice versa*.

Nor by the *st.* 4 & 5 Ann. 16. judgment by confession, *nil dicit, non sum informatus*, or when a writ of inquiry is executed.

Or, that *ideo concessum est per curiam* is entered, for, *ideo consideratum est per curiam*.

Or, that the costs increased after verdict in an action or nonsuit in *feplevin*, are not entered to be, at the request of the party for whom judgment is given, or that costs *de incremento* in any case are not entered to be by consent of the plaintiff.

* The want of *ex assensu* may be amended even after error brought and argued. *Str.* 869. *Ld. Raym.* 1570. *Doug.* 116. *

Provided, not to extend to any appeal, indictment, presentment, or action on any penal statute, unless for customs of tunnage and poundage.

Before the above statute, if in the judgment one party was misnamed, when he was rightly named in the record, the judgment would be amended by the record; for it was a misprision of the clerk. *R.* 1 Rol. 201. *l.* 20, 25, 35, 45. *R.* 1 Vent. 217. *R. Cro. Car.* 594.

So, *misericordia*, for *misericordia*, would be amended. *R.* 1 Rol. 201. *l.* 42.

So in an action upon the *st.* 2 Ed. 6. 13. plaintiff declares that he sowed buck and wheat, and that the defendant did not set out tithes of the wheat; and the judgment is, that the plaintiff shall recover his debt for the buck and wheat; it shall be amended; for the plaintiff does not declare of not setting out tithes of the buck. *R.* 1 Rol. 205. *l.* 30.

So,

So, if judgment be entered upon a demurrer, as upon a non-suit. *R. 1 Rol. 205. l. 40.*

So, if the sum total for damages and costs be miscast. *R. 1 Rol. 205. l. 45.*

So, if a judgment upon a verdict be entered different from the *postea*. *R. 1 Rol. 206. l. 5. 2 Cro. 628. Jon. 9.*

So, if a judgment in ejectment omit *quod recuperet terminum*. *R. 1 Rol. 206. l. 20.*

So, if a judgment be entered different from the prothonotary's book. *R. 1 Rol. 206. l. 25, 30. * Or different from the paper on which the master signed judgment. Ld. Raym. 897. **

So, if a judgment be entered, *quod 2. nil capiat per breve*, where it should be, *per billam*. *R. 1 Rol. 206. l. 40.*

So, if, *eat inde sine die*, be omitted. *D. 1 Sid. 70.*

So, if a judgment be, *quod recuperet pro misis et custagiis*, where it should be *pro debito*. *R. 1 Vent. 132.*

So, if the whole judgment was omitted. *Vide infra.*

So a judgment that the wife be in *misericordiâ*, where it ought to be, that the husband and wife be in *misericordiâ*, it shall be amended, where the prothonotary's book is so. *R. Mo. 869.*

If judgment be against an executor generally upon an affidavit, that instruction was given to enter the judgment according to the plea, which was *plene administravit*, it shall be amended, and made a judgment *de bonis testatoris si, &c.* *R. 2 Lev. 22. Carth. 167.*

But the judgment of the court itself was not amendable; as, *ideo videtur*, for *ideo consideratum est*. *R. 1 Rol. 201. l. 40.*

So, *consideratum est quod A. recuperet*, instead of *B.* it shall not be amended. *R. 1 Rol. 201. l. 30. Cont. R. Ray. 39. R. cont. 4 Mod. 371.*

Nor, costs *de incremento* assessed *per juratores*, where it should be *per curiam*. *R. 1 Rol. 205. l. 20.*

Nor a *misericordia*, for a *capitur*, or *è contra*, 'till the *fl. 16 & 17 Car. 2. R. 1 Sid. 70. D. 3 Mod. 112. Carth. 167. Vide Lect. (O. 7, 8.)*

Nor, *quod A. capitur*, where it ought to be, *prædictus B.* *R. Cro. El. 609.*

Yet, since the *fl. 16 & 17 Car. 2.* if all the judgment part, *ideo consideratum est quod querens nil capiat per billam et quod def. eat sine die*, be omitted, it shall be amended. *R. 2 Sand. 289.*

[If a *capitur* is added, where it does not lie, as against an infant, it is aided after verdict by *stat. 16 & 17 Car. 2. Hacket v. Marshal, P. 6 G. Str. 313.*]

[The want of a writ of inquiry of damages is aided after judgment by default by *4 Ann. c. 16. Hles v. Pitt, T. 11 G. Mallory v. Jennings, H. 3 G. 2. Ld. Raym. 1397.*]

If defendant is found not guilty as to part, and there is no judgment entered for him (which there might be) the record may be amended by the verdict, and judgment added, even after error brought, and the record removed, and this want of judgment objected for error. *Smith v. Fuller, M. 1 G. 2. Str. 786.* [14]

[If judgment is entered that plaintiff *should* recover, instead of *do*, it may be amended after error. *Blakey v. Birmingham*, P. 13 G. 2. Str. 1132. *Slicer v. Thompson*, T. 14 G. 2. Str. 1156.]

[Judgment on demurrer to replication may be amended after error, by adding the words introductory to awarding inquiry, viz. that plaintiff ought to recover his damages against defendant. *Hillierden v. Skildroy*, H. 16 G. 2. Str. 1182.]

* But a judgment cannot be amended by filling up a blank for the costs and damages. *Lord Raym.* 68.*

[In dower, if there is judgment as to part, and the tenant *in misericordia*, and as to the rest plea and demurrer, and before judgment another comes in *pro interesse suo*, and judgment for demandant on the demurrer, *et quod tenens sit in misericordia*, on error, the court will amend by striking out the first *misericordia*. *Bern v. Bern*, M. 8 G. 2. B. R. H. 72.]

[Want of venue where promise made, is aided after verdict by stat. of *jeofails* of Car. and by st. 4 & 5 Ann. extended to judgments on writs of inquiry. *Moore v. Paine*, T. 9 G. 2. B. R. H. 288.]

[If plaintiff lays damages at 10*l.* and jury find a verdict for him, and 30*l.* damages, and judgment entered and error brought, the court cannot give leave to plaintiff to enter a *remittur*. *Ray v. Lister*, P. 12 G. 2. Andr. 384.]

[In trespass against three, if two plead and one lets judgment go by default, and the jury find 35*s.* for plaintiff, and on writ of inquiry 2*s.* is given against the other, plaintiff may take judgment *de melioribus damnis*, or may enter a *remittitur*, but if judgment be entered that plaintiff recover 35*s.* against two, and 2*s.* against the third, this makes it bad in point of law, and it cannot be amended. *Sabin v. Long*, M. 17 G. 2. Wilf. 30.]

[If the record of an old judgment on a warrant of attorney has omitted a letter of defendant's name, the court will not suffer it to be amended by the warrant for fear of inconveniences to purchasers. *Sale v. Crompton*, P. 17 G. 2. Str. 1209. Wilf. 61.]

[The st. 7 & 8 W. 3. c. 7. (concerning false returns of members of parliament) is remedial, and within the st. of *jeofails*, 16 & 17 C. 2. c. 8. and 5 G. 1. c. 13. *Williams Wyne v. Middleton*, in exchequer chamber, H. 19 G. 2. Wilf. 125. Vide *Parliament*. D. 15.]

[Common recovery may be amended, considered for adjudged, transposing names of demandant and tenant agreeable to the deed for tenant to *præcipe*, prayer of seisin, and entry of return, and name of a vill put in its proper place. *Barnes* 20, 21, 22, 23, 24.]

[Judgment in *Ireland* may be amended here. *Berne v. Berne*, M. 8 G. 2. *Thompson v. Slicer*, P. 14 G. 2. 4 B. M. 2157.]

(S) Writ of Inquiry.

SO a misentry of the clerk in a writ of inquiry shall be amended: as, if *per sacramentum proborum et legalium hominum*, be omitted. *R. 3 Mod. 112.*

If the judgment be said to be upon nonsuit, where it was upon demurrer. *R. 2 Cro. 372.*

[If there is judgment for plaintiff on one promise, and a *nolle prosequi* as to another, and the writ of inquiry is *occasione premissorum*, it may be amended by the record. *Hughes v. Alvarez, H. 12 G. Str. 684. Hammond v. Gatcliffe, H. 11 G. 2. Andr. 77.*]

[If there are three defendants, and the writ of inquiry recites it to be against two only, it may be amended on motion, on paying costs. *Condren v. Coulter, M. 10 G. 2. B. R. H. 314.*]

If a writ was awarded to be returnable *die Martis post tres Trin.* and it was returnable *die Mercurii post tres Trin.* *R. Cro. El. 761.*

[It may be amended by altering the return, and making it conformable to the award thereof on the roll, though there is no such return as is mentioned in the writ; and it might therefore be considered as void, no day being given to the party. *Redway v. Poole, H. 12 G. 2. Andr. 362.*]

If it was returnable after term, if executed within the term, and the award upon the roll was right. *R. Carth. 70.*

So the award being defective shall be amended by the writ itself, if that be right. *Carth. 70.*

So if no writ of inquiry be awarded upon the roll, it shall be aided since the *stat. 4 & 5 Ann. 16.* *R. F. g. 162.*

But where the award upon the roll, and the writ are both mistaken, it cannot be amended. *R. Sho. 61. Semb. Carth. 70.*

(T) Misprision of the Clerk. What shall be called so.

(T. 1.) Mistake of his Instructions, or that, which ought to warrant his Proceeding.

IF the clerk does not pursue his instructions, this shall be said a misprision. *Vide ante, (D. 1.)—L. 2.)—post, (W.)*

And therefore, if the instructions are plain, and part is omitted upon roll: as, the day, year, &c. the roll may be amended. *R. Lat. 165.*

So, if he does not pursue, that which ought to be the warrant for his proceedings: as, if the plea roll be not conformable to the imparlance roll. *R. 3 Lev. 360.*

And therefore, the plea roll may be amended by the imparlance roll. *R. 1 Rol. 207. l. 45. 2 Cro. 105.*

But not *à contra.* *1 Rol. 198. l. 15. 2 Cro. 311, 415, 499, 537.*

So,

So, if the second declaration be not agreeable to the first.
2 Cro. 89.

So if the declaration upon the roll be not agreeable to the paper draught, it may be amended by it. R. 1 Rol. 198. l. 45.

So, if a writ of process, &c. recites other proceedings, but there is a misprision in the recital, it may be amended by the record recited.

As, if a *scire facias* against bail recites a *capias nuper regine* directed *vicecomiti nostro*, where it ought to be, *vicecomiti nuper regina*. R. 1 Rol. 199. l. 15.

So, if a writ well awarded upon the roll varies from it, it may be amended by the roll. *Vide post*, (V. 1.)

A misprision in the name of the plaintiff or defendant in the record, may be amended by the original. R. 1 Rol. 201. l. 47.

* 3 Wilf. 43.*

So a judgment may be amended by the record. *Vide ante*, (R.) or by the docket book. *Vide ibidem*.

So a record of *nisi prius* shall be amended by the original record, when the amendment does not alter the issue, nor subject the jury to an attain. R. 1 Rol. 202. l. 7, 37, 40, 52, 203. l. 5, 45. R. 2 Cro. 354.

* So variance in the *nisi prius* roll may be amended by the plea roll in an indictment for forgery. *Sir*. 843.*

And the *poslea* by the plea roll. *Pr. Reg.* 20.

Otherwise if the amendment alters the issue, or subjects the jury to an attain. R. 1 Rol. 202. l. 5, 15, 20, 30. R. Cro. El. 776.

So a record may be amended by the book in the office. R. 1 Rol. 207. l. 22.

The record of a special verdict, by the notes signed by the counsel. 1 Rol. 207. l. 20.

The plea roll, by the paper book. *Vide ante*, (L. 2.) R. Sel. 50.

The award upon the roll, by the writ itself. *Semb. Sho.* 61.

The roll in court, by the warrant of attorney allowed by a judge, or entered in the remembrancer's office. *Lit.* 60.

The *teste* of a writ, by the award upon the roll. R. *Hard.* 21.

* So a clerical mistake in a return to a *mandamus* may be amended after the return has been filed. *Doug.* 135, 137.*

* So, omissions in matters of form may be amended after error brought in *qui tam* actions. *Doug.* 115.*

* So, a bill of *Middlesex*, filed of record, as of 24 G. 3. when it ought to have been of the 25th, may be amended agreeable to the truth. 1 *Term Rep.* 782.*

* So, in the case of executors, if the clerk enter judgment *de viis propriis*, instead of *de bonis testatoris*, and error is brought. R. will order the entry to be amended, even if the record be sent back from the exchequer chamber. 1 *Term Rep.* 783.*

(T. 2.) Mistake of a Name rightly named before.

So, if he mistake the name of the defendant, who was named before in the same record. *R. 1 Rol. 199. l. 20, 32. R. 2 Lev. 117.*

[If defendant is rightly named in the writ and declaration, and in appearance entered by plaintiff is misnamed, the entry shall be ordered to be set right by the filacer. *Whelton v. Packman. H. 10 G. 3. 3 Wils. 49.*]

Otherwise, if the misprision was, where he was first named. *1 Rol. 199. l. 35.*

Or, alters the issue. *R. 1 Rol. 203. l. 10.*

So, if the defendant pleads *nil debet, &c.* and the entry is, *et prædictus defendens similiter*, where it ought to be, *prædictus querens*, it shall be amended by force of 8 *H. 6.* for it is but the default of the clerk. *R. Cro. El. 435. Vide ante, (O.)*

So, if to a partition against two, one confesses, and *B.* pleads to issue, which is entered between the plaintiff and *A.* and *B.* whereas *A.* had confessed, after verdict it shall be amended; for it was the misprision of the clerk of the treasury. *R. per three Judges, Dy. 260. b.*

In action for words, if the declaration says, *prædictus D. dixit de Q. He, innuendo D.* it shall be amended. *R. 2 Cro. 157.*

[The plaintiff's name being *Walter*, one of the *assumpsits* was laid *præfat. Willielmo*, there being no *William* mentioned in the record before. This was held not to vitiate, even without the aid of *st. 16 & 17 Car. 2. Coleman v. Earle, M. 6 G. Str. 228.*]

[The same allowed in a replication. *Anon, M. 7 G. Ld. Fort.*]

(T. 3.) Omission of a Word, &c. of Course.

If the clerk add or omit a word of course. *Vide ante, (D. 3.)*

Or, omit an entry of the continuances, which by the course of the court ought to be entered. *R. 1 Rol. 200. l. 5.*

Or, mistake in a matter of course; as, in the direction of a writ, &c. *Vide ante, (D. 3.)*

Or, misenter, or in part omit a matter which he ought to enter of himself. 10 *H. 7. 23. b.* though it be substance.

Otherwise, if he totally omit it. 10 *H. 7. 23. b.*

(T. 4.) Misprision of a Word not Latin.

So, if he mistake a word not *Latin*, for *Latin*. *Vide ante, (D. 2.)*

Or, a *Latin* word, for another like it in sound. *Vide ante, (D. 2.)*

Or, write one name for another like it in sound. *R. 1 Rol. 199. l. 39, 40.*

Or, omit a *Latin* word, leaving a blank for it, with *Anglice*. *R. 2 Cro. 258.*

(T. 5.)

(T. 5.) Neglect to file Bail, &c.

So, if he neglect to file bail, when it appears that the attorney was allowed his fees for it. *R. 1 Rol. 207. l. 10. 206. l. 50.*

If in the entry of an essoin, he omit the action in which, &c. *Semb. 2 Cro. 93.*

If a man be committed in court upon the return of a *cepi corpus* and the *committitur* is not entered upon the roll. *R. 2 Rol. 112.*

(T. 6.) Razure made in the Record.

So, if a record be razed and made vitious, it shall be amended, though the razure is felony. *R. 1 Rol. 208. l. 5, 10.*

(V) What shall not be called a Misprision of the Clerk.

(V. 1.) Ignorance.

BUT a default, which proceeds from the ignorance of the clerk, shall not be said a misprision.

As, if he mistake the legal form of a writ; as, *precipe quod reddat*, for, *precipe quod solvat*, or *è contra*. *8 Co. 159. b.*

So, if a writ be in the *detinet* only, where it ought to be in the *debet* and *detinet*, or *è contra*. *8 Co. 159. Hut. 57.*

But now by the *st. 16 & 17 Car. 2.* after verdict, it shall be aided.

Yet where it is uncertain, whether it ought to be the one, or the other, it shall not be amended. *Per Holt. Sho. 58.*

So the misrecital of a statute, though his instruction was right. *Semb. Hut. 56.*

So, if a *disfringas* issue, *et quod apponat decem tales*, this cannot be amended; for the *decem tales* ought to be added to the jury summoned by the *venire*, and not to the *disfringas*. *1 Rol. 199. l. 50.*

If a *venire facias* issue returnable at a day before the *teste*, it shall not be amended. *R. 1 Rol. 200. l. 41, 44.*

[If a *scire facias* is made returnable on *Friday*, the morrow of *St. Martin*, when *St. Martin's* day is on *Friday*, it shall not be amended. *Semb. Hillier v. Frost, M. 7. G. Sir. 401.*]

Otherwise, if the award upon the roll was right, the writ shall be amended by the roll. *R. 1 Rol. 200. l. 50. 201. l. 5, 10. 205. l. 5. Tel. 64. 2 Cro. 64. Vide ante, (C. 1, 2.)*

(V. 2.) Defect in Information.

Nor a default, which proceeds from a defect of good information of the party.

And

And therefore, if a statute-merchant is acknowledged by *A. B. armiger*, who afterwards is made a knight, and then the statute is certified in *chancery*, and upon that a *capias* is awarded, and returned against *A. B. armigerum*, and an extent thereupon, it shall not be amended; for it was the default of the party, in not informing that *A. B.* was a knight. *R. 1 Rol. 198. l. 35.*

If *A.* brings an action upon the case against *B. quia crimen felonii ei imposuit* for stealing the horse *ipsius A.* where it was intended *ipsius def.*, this shall not be amended; for it is matter of fact which might be true. *R. 1 Rol. 199. l. 45.*

If a writ be against *A. militem et baronetum*, and he is not a baronet, or only a baronet, and not a knight, it shall not be amended. *R. 1 Vent. 154.*

[Writ of *quare impedit*, and declaration agreeable to instructions shall not be amended, though after six months, and lapse will incur. *Barnes 9.*]

[The court may give leave to amend a writ of formedon mistaken in setting out the estate tail, on payment of costs thereof, and of ejectment brought for the same lands. *Scot v. Perry, P. 11 G. 3. 3 Wils. 206.*]

(V. 3.) Variance in one Part of the Proceeding from another Part.

Nor a default, which proceeds from not having good regard to the former proceedings, which are not a warrant for the proceeding in which the default is: as, if an original be taken out of the county of the city of *York*, and the declaration upon the imparlance roll has in the margin *civitas Ebor.*, but is, that the defendant *apud villam novi castri super tinam concessit se teneri*, &c. though the plea roll also be right, yet the imparlance roll cannot be amended by the plea roll, nor shall it be amended by the original. *R. Hob. 251. 1 Rol. 198. l. 55.*

So, if the *habeas corpora* be to have the jury, *summonitis in curia nuper regina*, and the *disstringas, summonitis in curia nostra*, it shall not be amended by the *habeas corpora*. *R. 1 Rol. 199. l. 5.*

So, if a declaration upon the statute 2 *Ed. 6. 13.* be for tithes *de 20 acris*, and afterwards says, *de quibus 30 acris*, no tithes are paid; this shall not be amended, there being no roll to warrant the amendment. *R. 1 Sid. 135.*

So, if an attorney makes a roll for an imparlance roll, &c. in order that the record may be amended by it; after motion for the amendment he shall be punished, but the amendment shall not be avoided. *R. 3 Lev. 360.*

(W) Form. What shall be called so.

MATTER of form is such matter of course, as the clerk may supply without any information of the party. *R. 5 Co. 35. b.*

As,

Vol. I.

As, the day, or year, in a transitory action. *Lat.* 165.

So, if the clerk does not pursue his instruction, or that which ought to warrant his proceeding: as, if a writ be awarded by the roll to the sheriff of S. and in the writ the word *vicecomiti* is omitted. *R. Cro. Car.* 559. *Vide ante*, (T. 1.)

So, default of precise certainty is but form, where the certainty in general appears; as, if a man plead a descent to him, as heir, without shewing, how he is heir. *R. 1 Lev.* 190.

[So a writ of covenant of lands in *insula Antegoa in America*, in *partibus transmarinis*, in *St. Mary, Islington*, in *com. Surry*, amended by striking out in *America in partibus transmarinis*, as being matter of form only. *Forster v. Pollington*, T. 8 & 9 G. 1. C. B. *Fort.* 186.]

(X) What not.

BUT a thing material to the action being omitted, shall not be amended after trial, though omitted by the neglect of the clerk: as, in debt against the heir, if it be omitted in the declaration, that he bound his heir, it shall not be amended after verdict. *Semb. Jon.* 199.

(Y) No Amendment, where there is nothing by which the Amendment shall be made.

SO a thing not material shall not be amended, where there is nothing by which it may be amended: as, if the defendant to a bill in *B. R.* against him as knight, plead that he is baronet; it cannot be amended after replication, though an addition in a suit by bill is not necessary. *R. 1 Sal.* 50.

If judgment upon the *nisi prius* roll be in *miserericordia*, where the plea roll is *capiatur*, it shall not be amended by the plea roll. *1 Rol.* 211.

[Motion refused to amend an *estreat* of a fine for a misdemeanor in court, by adding the place where the man lived, because no record to amend by. *Estreat* on an indictment, so amended, because there was an addition in the indictment, which was a record to amend by. *Rex v. Abp. of Canterbury*, in *St.* T. 1718. *Bunb.* 24.]

[Rejoinder in the paper book may be amended, by the draught signed by counsel (being verified by affidavit.) *Anon. H.* 9 G. 2. *B. R. H.* 205.]

(Z) Or, where the Issue tried will be altered, or the Jury subjected to an Attaint by it.

SO, no amendment shall be after verdict, where the amendment alters the issue tried, or subjects the jury to an attaint.

(2 A.) At what Time an Amendment shall be.

WHEN an amendment shall be allowed by the rule of the court. *Vide in Pleader, (C. 6.)*

An amendment may be made of a record, after error allowed. *R. Poph. 102.*

Though error be assigned for the same point. *R. Lat. 162.*

An amendment shall be allowed after error, so long as a *certiorari* lies for diminution. *R. Jon. 9.*

But, if an amendment be after error, the plaintiff in error shall have costs, if he proceeds no further; otherwise, if he does proceed. *3 Lev. 361. 2 Mod. Ca. 234.*

* The *locus in quo*, may be amended after plea in abatement. *Str. 11. **

* So, an information may be amended in the addition after plea in abatement. *Asc. Ld. Raym. 1472. Cont. Ld. Raym. 1307. **

* But not after issue joined on such plea. *Id. 859. **

[The declaration may be amended on payment of costs, after verdict set aside, and new trial granted. *Turvil v. Aynsworth, M. 1 G. 2. Str. 787.*]

* But after new trial granted, the record cannot be amended by striking out pleas, for that may vary the question to be submitted to the jury. *2 Bl. Rep. 920. **

* An amendment may be after error brought without payment of costs where the writ of error is brought too soon. *Ld. Raym. 95. **

* After judgment, declaration in trover may be amended, by inserting defendant's name where it was omitted. *Ld. Raym. 116. **

[Judgment on an action for a false return of member of parliament, may be amended (by adding a continuance and *miseri-cordia*) after error brought; for nothing is excepted out of *stat. 8 H. 6. c. 12.* but appeals and indictments of treason and felony. Plaintiff may assign errors *de novo*. *Watkin Williams v. Middleton, P. 18 G. 2. Str. 1227.*]

[The court will not suffer a *side bar* rule to amend, to stand, if obtained without disclosing all the circumstances, though it is right in itself. *Symonds v. Parmenter, P. 18 G. 2. 1 Wils. 86.*]

[If plaintiff's attorney enters an appearance for defendant not of age without guardian, though he has notice of it, and defendant pleads, and plaintiff proceeds and sets down the cause, yet he may have a rule for defendant to plead by guardian in six days, and to amend the record accordingly. *Shipman v. Stephens, H. 30 G. 2. 2 Wils. 50.*]

[But if he had proceeded to judgment, though without notice that defendant was under age, and afterwards error being brought, he would not have had leave to make the record right. *Ibid.*]

[If on *assumpsit* for money lent to a third person, verdict for plaintiff, and judgment arrested because *assumpsit* does not lie for money

money lent to third person, plaintiff brings error, and produces an original writ purchased since, in which the count is for money paid and advanced to third person; he shall not have leave to amend the declaration by it. *Marriot v. Lister*, M. 3 G. 3. 2 *Wils.* 147.]

[Judgment roll amended from *ought to*, to *do* recover; after error brought, and in *nullo* pleaded. *Barnes* 7.]

[Avowry may be amended in the sum, after demurrer in the paper, on costs. *Barnes* 8.]

[And after argument on demurrer, on the form, but not on the merits. *Barnes* 9.]

[Continuance on roll after judgment on demurrer. *Barnes* 3.]

[Fine, in form, after error brought. *Barnes* 216.]

[Declaration after demurrer, on costs, but not on imparlance. *Barnes* 6.]

[Venue changed after plea, on costs. *Barnes* 6.]

[After plea roll filed, declaration cannot be amended if it will deface the roll. *Barnes* 8.]

[*Ca. sa.* amended by judgment, in the name, after executed.]

[After judgment for plaintiff on demurrer, replication may be amended by concluding to the country instead of averment. *Barnes* 5.]

[After writ of inquiry executed, plea may be amended, on costs, and bringing into court the damages found. *Barnes* 15.]

[So the writ itself, by striking out a defendant's name. *Barnes* 15.]

[Final judgment on verdict, after error brought, and record transcribed, but not carried in. *Barnes* 18.]

[After second term, new count added, on costs, and liberty to plead *de novo*. *Barnes* 19.]

[New pleas shall not be added, if the title is in question, and the cause to be tried at sittings after term. *Barnes* 19.]

[Declaration, after issue joined, notice of trial, and motion for judgment as in case of nonsuit, on terms. *Barnes* 317.]

(2 B.) By what Court an Amendment shall be.

ORIGINAL writs, though they issue out of chancery, are to be amended by the court where they are returnable. *Forster v. Pollington*, T. 8 & 9 G. 2. C. B. *Fort.* 186.]

If error be in B. R. of a judgment in C. B. the record being amendable, may be amended in B. R. as well as before in C. B. *H. 6. 15. b. R. 1 Rol. 209. l. 45. 2 Rol. 471.—D. Co. 162. Popb. 102.*

And after error brought in B. R. the record, before removal, may be amended in C. B. *Semb. 2 Cro. 628. Hard. 505. Popb. 102.*

So, after a *mittitur* entered upon the record. *R. 1 Rol. 209. l. 1.*

And, after the record certified. *R. Hard. 505.*

So in error upon a judgment in a *quare impedit* before justices of assize. *Hob. 327. Hut. 41.*

So in error upon a judgment in *Ireland*, the record may be amended in *B. R.* *R. 1 Vent. 217. Berne v. Berne, M. 8 G. 2. Thompson v. Slicer, P. 14 G. 2. 4 B. M. 2157. * Cowp. 841, 844. **

So, if error be brought in the exchequer chamber of a judgment in *B. R.* and the transcript of the record certified (for the record itself remains in *B. R.*) the record may be amended in *B. R.* and the party may alledge diminution, and so make the amendment appear in the exchequer chamber. *R. 1 Rol. 208. l. 45. 2 Cro. 628. * Str. 837. **

Or, the clerk of *B. R.* may go into the exchequer chamber, and amend the transcript according to the record. *R. 1 Rol. 208. l. 50. Hard. 505. Semb. 2 Bul. 149.*

So it may be amended in the point assigned for error. *R. 1 Rol. 209. l. 10. * Lat. 162.*

Or, the clerk of the errors may go into *B. R.* and there amend the transcript by the record. *R. 1 Rol. 209. l. 15.*

Or, upon shewing the amendment in the exchequer chamber, judgment shall be affirmed, without an amendment of the transcript. *R. 1 Rol. 209. l. 25.*

So, where there is no entry upon the record, the clerk may make an amendment of a thing amendable. *R. Lat. 165.*

So the court may amend, if there be cause, after entry upon the record. *Lat. 165, 166.*

[Superior court where error is brought cannot amend, unless they have the same matter to amend by as the inferior court hath; but will, *ex debito justitia*, send a *certiorari* to inform the conscience of the court, *e. g.* to know if there are continuances. *Rex v. Ponsonby, T. 24 & 25 G. 2. 1 Wils. 303.*]

So, an amendment may be by the courts of *Wales*, though there be a proviso in the statute 8 *H. 6. 15.* that it shall not extend to process in *Wales*; for the statute 27 *H. 8. 26.* repeals this proviso. *R. 2 Sand. 40.*

So *B. R.* may amend a record there in error, by the record of *C. B.* brought by the officer, without costs; for it is of course, to save the charge of a *certiorari* to remove the original or diminution alledged, and costs ought to be prayed upon the amendment of the record in *C. B.* *Per Holt, 1 Sal. 49.*

But, upon error in *B. R.* of a judgment in an inferior court, the record shall not be amended in *B. R.* *R. 1 Rol. 209. l. 50, 210. R. cont. Cro. El. 435.*

Nor, upon error in *C. B.* shall it be amended there; for it is not usual to amend the errors of inferior courts. *R. 1 Rol. 209. l. 50.*

* But the transcript of a record in error from a base court may be amended by the record below, to be produced before the master. *1 Wils. 337. **

So a discontinuance in an inferior court, whereby the action is out of court, shall not be amended. *4 Mod. 86.*

Yet discontinuances in inferior courts shall be aided by the statute 32 *H. 8. 30.* as well as in superior. *R. 1 Sal. 177.* where

where the discontinuance is only in the process or pleading.

4 *Mod.* 86. *R. Sho.* 319.

And now, by the *stat. 5 Geo. 13.* After verdict in any court of record in *England* or *Wales*, judgment shall not be stayed, or reversed for any default of form, or substance, in any bill, writ original or judicial, or variance from the declaration, or other proceedings.

So an amendment cannot be made by the clerk in a matter amendable, without the order of the court; and if he does it, he may be committed. *Fon.* 302.

[A judge's order to amend must contain the particulars in the body of it. *Barnes* 15.]

* By the *stat. 5 G. 2. c. 19. s. 1.* The justices at the general or quarter sessions may rectify defects of form in appeals.*

* But they cannot amend orders by adding new averments. *Str.* 1158.*

* Nor by altering any thing relating to the merits. *Bur. Sett. Ca.* 163.*

(2 C.) To what Cases the Statutes of Amendment do not extend.

(2 C. 1.) Appeals, and Indictments.

BY the statutes 8 *H. 6.* 12. and 15. which enable an amendment of a misprision of the clerk in affirmance of the judgment, and by the subsequent statutes 32 *H. 8.* 30. 18 *El.* 14. 21 *Jac.* 13. and 16 & 17 *Car.* 2. 8. which enable amendments after verdict; appeals, and indictments, and the process on them are excepted, *viz.* appeals, and indictments for treason and felony.

And therefore, the court will not amend a judgment upon an indictment entered contrary to the minutes. *R. 4 Mod.* 396.

Nor, a verdict. 1 *Sal.* 47. 53.

So in an appeal, the appellant shall never be allowed to amend. 4 *Mod.* 150.

Nor, the appellee: and therefore, where a plea of conviction upon an indictment omits the authority of the court, it shall not be amended. *R. 4 Mod.* 158.

But by the common law, an indictment was amendable in the same term in a small misprision. *Vide ante A.* * in the caption of the indictment. *Ld. Raym.* 968.*

So, a plea to an indictment when filed, but not upon record, shall be amended; for the court has power over all before judgment. *R. Holt Dub. Sal.* 47.

* But a count cannot be struck out by amendment, for that is the finding of the grand jury. *Str.* 1026.*

(2 C. 2.) Actions and Informations on Penal Statutes.

So, by the *stat. 21 Jac.* 13. and 16 & 17 *Car.* 2. 8. actions and informations on penal statutes are excepted.

And

And therefore, an action by *qui tam*, &c. or an information by a common informer, is not within the statutes of jeofails. *R. 1 Sal. 325. Cont. as to the action by qui tam, &c. R. 3 Lev. 375.*

So an information of intrusion by the king is not within the statutes of jeofails; for the king is not named, and shall not be bound by them. *Cro. Car. 312.*

Nor, a *quo warranto*. *R. per three judg. Cro. Car. 312. Per two judg. Hale, cont. 2 Lev. 139.* But now, by the *st. 9 Ann. 20.* it shall be amended.

But by the common law, a small misprision might be amended in an information for perjury. *1 Lev. 189. Vide ante, (A.)*

So a misprision in the caption may be amended in the same term, that the indictment is removed, but not in another term. *1 Sand. 249.*

So an information and plea thereto, or to an indictment, may be amended by the discretion of the court, before entry upon record. *1 Sal. 47. R. Skin. 336.*

[Information for a criminal misdemeanor may be amended by the common law, after the record is made up and sealed, by a judge at chambers, on hearing both sides, *without* defendant's consent. *R. v. Wilkes, T. 8 G. 3. 4 B. M. 2527.* where this point is discussed at large.]

So every thing amendable in a civil action by the common law, shall be now amended in a criminal case. *R. 1 Sal. 51.*

So in an indictment for a nuisance, omission of the *similiter* in joining of the issue shall be amended. *R. 2 Rol. 59.*

So, an omission of a continuance at the time of trial. *Semb. Jon. 420.*

* But a discontinuance cannot be amended in a criminal case, for that was not amendable at common law. As where the distringas is tested the day after the return of the venire. *Ld. Raym. 1061.* *

So, by the *st. 16 & 17 Car. 2. 8.* An amendment shall be allowed in an action or information, which concerns the customs or subsidies of tunnage and poundage.

[Information was laid, that tea was imported between, &c. and the day of exhibiting the information (which was the very day of the seizure;) and leave was given to amend, by making it next day. *Baldwin v. —, in Scac. M. 1719. Bunb. 49.*]

[Information of seizure for importing brandy and rum in casks under 60 gallons, amended, by making it as to the rum under 20 gallons. *Brooke v. Day, H. 1733. Bunb. 334.*]

[If the indenture of appraisement is dated before the writ of appraisement, and the information on a seizure, it may be amended after verdict. *Semb. per cur. Kennet v. Lloyd, in Scac. H. 1719. Bunb. 58.*]

[Information on act of navigation amended, by changing the word *silks* to *goods*. *Edgell v. Decker, P. 1728. Bunb. 252.*]

[But it shall not be amended by adding other goods. *Ibid.*]

[Infor-

[Information for killing a hare may be amended, by altering the parish where the offence was committed. *Howel v. James*, P. 20 G. 2. 1 *Wils.* 163.]

[Declaration in a *qui tam*, &c. may be amended. *W. W. Wynne v. Middleton*, P. 18 G. 2. *Str.* 1227. *Anon. M.* 23 G. 2. 1 *Wils.* 256.]

[The defendant's addition may be amended after plea in abatement, on payment of costs. *Rex v. Seaward*, H. 13 G. 2. *Str.* 739. *Ld. Raym.* 1412.]

[Information for forging warrant of attorney to acknowledge satisfaction on a judgment of *Easter*, amended after issue joined, to *Hilary*, without costs, (plaintiff a pauper) and without leave to plead *de novo*. *Rex v. Charlesworth*, T. 4 G. 2. *Str.* 871.]

* So information may be amended after plea in abatement on payment of costs. *Str.* 739. *Ld. Raym.* 1472. *

And by the *st.* 9 *Ann.* 20. In *mandamus*, and information in nature of a *quo warranto*, and all proceedings thereon, for matters mentioned in the said act.

So an information by the party grieved will be within the statutes of jeofails. 1 *Sal.* 325.

* But the court will not permit an amendment of an information in the venue, as if an assault be laid in *Middlesex*, they will not permit an amendment by laying it in *London*. *Str.* 911. *

[Where *stat.* gives a remedy to the party grieved only, it is not to be considered as a penal action, and it is therefore amendable (as hue and cry.) *Marrick v. Hundred of Ossulston*, H. 11 G. 2. *B. R. H.* 409.]

[But the court will not set aside a *non pros*, regularly obtained by defendant against a mere common informer, (on the statute of usury; though perhaps it would, if it was the party injured. *Bennet v. Smith*, M. 31 G. 2. 1 *B. M.* 401.)]

(2 C. 3.) Process to Outlawry.

So, by the *st.* 9 *H.* 5. 4. confirmed by 4 *H.* 6. 3. which enables an amendment of a misprision of the clerk in process; &c. a record, or process, upon which any one is outlawed at any man's suit, is excepted.

And by the statutes 21 *Jac.* 13. and 16 & 17 *Car.* 2. 8. and the other statutes of jeofails, outlawries for treason and felony.

But where there was a misprision of the county where the *quinto exaquis* was, a *certiorari* was awarded to the coroner to certify where it was, and upon his return it was amended. *Lat.* 210.

[If on action by original on bill of exchange against *A.* and *B.* jointly, *A.* appears, *B.* is outlawed, which plaintiff shews in his declaration; *A.* pleads no such record of outlawry; plaintiff replies there is such record; if there is a mistake in it, it may be amended on motion, and defendant plead *de novo*. *Symonds v. Parmenter*, P. 18 G. 2. 1 *Wils.* 86.]

(2 C. 4.) Writ of Error.

So a writ of error shall not be amended, though it be only the misprision of the clerk; for all the statutes of jeofails enable amendments in affirmance of judgments, not for the reversal. *R. 5 Mod. 16. 69. 1 Sal. 49. Carth. 520.*

So, if a *scire facias* in a writ of error recites a judgment for two messuages, when it was only for one; it shall not be amended. *R. 1 Sal. 52.*

So in a *scire facias* upon a judgment, if there be a misprision in the name of the party, or other part of the record, it cannot be amended. *R. 1 Sal. 52.* for the writ may be good for another purpose. *Mod. Ca. 310.*

But, for a defect in the writ itself, it shall be amended. *Ibid.*

So, now, by the *§. 5 G. 13.* Variance from the original record, or other defect in writ of error, shall be amended, and made agreeable to the record, by the court where the writ is returnable.

And the amendment shall be without costs. *F. g. 268. * Str. 863. **

As, if a writ of error says, *ad dampnum of the plaintiff and of A. the heir of B.* where *B.* died after the judgment; the addition shall be rejected. *F. g. 201.*

* As in trespass and false imprisonment against two, one only found guilty; writ of error in name of *both*; this may be amended by striking out the name of the defendant, for whom a verdict was given below. *Corwp. 425. **

But a new party shall not be added to a writ of error. *Ibid.*

* Where a writ of error is returnable before judgment given, it is not amendable by *§. 5 G. 1. c. 13. Str. 807. Ld. Raym. 1531. **

[If the writ of error does not describe the suit by the names of all the parties, but of those only against whom judgment, and who bring error, it may be amended by adding the names of the others. *Lady Cags v. Title, H. 12 G. Str. 682.*]

If after verdict in ejectment against a company and *A. A.* dies, and error lays the judgment *ad grave damnum* of the company and the heir of *A.* and they jointly assign errors, it may be amended by *5 G. c. 13.* by striking out the name of the heir. *Sword-blade Company v. Dempsey, H. 4 G. 2. Str. 892.*]

[If a writ of error be directed to an inferior court by a wrong name, it may be amended by the record. *Collins v. Muxworthy, H. 9 G. 2. B. R. H. 194.*]

[If in *scire facias quare execut. non, &c.* the command is to have there the writ, and the names of those by whose oaths he summoned, whereas the summons is not to be made by oath, it may be amended. *Medley v. Stokes, M. 10 G. 2. B. R. H. 321.*]

[The court may amend it *ex officio.* *Gardner v. Mernett, P. 4 G. 2. Str. 902. Ld. Raym. 1587.*

[If

[If a *scire facias* on a recognizance against bail, recites the record was *in hac parte*, whereas it should have been *in ea parte*, it shall not be amended. *Piper v. Thompson*, H. 1726. *Bunb.* 228.]

[If judgment on *scire facias* is against four bail, and two only bring error, it is not amendable, and the writ must be quashed. *Elkins v. Paine*, T. 2 G. 2 *Ld. Raym.* 1532.]

[If there is judgment against two, and one only brings error it cannot be amended, for the fault is substance. *Railcliff v. Burton*, T. 8 G. 2. *B. R. H.* 135.]

[If writ of error is returnable before judgment given, it cannot be amended. *Wright v. Canning*, T. 2 G. 2. *Str.* 807. *Ld. Raym.* 1531.]

Amendment of the Defect of a Court Roll.

Vide Copyhold, (I. 2.)

Amendment of a Bill in Parliament.

Vide Parliament, (G. 20.)

A M E N D S.

Vide Pleader, (2 G. 2.—2 W. 28, 49.—3 K. 23.—3 M. 36.)

A M E R C I A M E N T.

Vide Distress, (B. 3.)—*Leet*, (O. 1, &c.)—*Pleader*, (3 K. 27.)—*Prærogative*, (D. 58.)—*Sewers*, (E. 7.)

A M O V E A S M A N U S.

Vide Prærogative, (D. 90.)

A N C E S T R A L A C T I O N.

Vide Action, (D. 2.)

A N C I E N T D E M E S N E.

(A) What Lands are Ancient Demesne.

ALL lands mentioned in domesday book, to be holden of a manor in the demesnes of *Edward the Confessor*, are ancient demesne. *F. N. B.* 16. D. 4 *Inst.* 269.

So

So all lands there mentioned to be holden of a manor in the hands of *Edward the Confessor*, or *William the Conqueror*. *F. N. B.* 14. *D.* 2 *Inst.* 542. 4 *Inst.* 269.

So land may be *ancient demesne*, though it be parcel of a manor, which is not *ancient demesne*. 1 *Rol.* 321. *l.* 10.

Land in *ancient demesne* is as ancient as the government, and their privileges must have commenced by act of parliament. *Per Holt*, 1 *Sal.* 57.

(B) What Frank-fee.

BUT land mentioned in domesday, to be in the hands of another person than the king, is frank-fee. *F. N. B.* 16. *D.*

So, land there not called *terra regis*, but *terra episcopi*. 40 *Ed.* 3. 45. *Kit.* 98. *B.*

The manor of *ancient demesne* itself and all the demesnes of it are frank-fee, and pleadable by the common law. *F. N. B.* 11. *M.* 1 *R.* 325. *l.* 10. 323. *l.* 43. 1 *Sal.* 56.

And therefore, all improvements made by the lord out of his wastes, cannot be *ancient demesne*. 1 *Rol.* 321. *l.* 15.

So a copyhold of a manor is not *ancient demesne*; for it is parcel of the demesnes of the manor. 3 *Lev.* 405. *R.* 2 *Cro.* 559. 1 *Sal.* 186.

And if the plaintiff says, that the land is held *ut de manerio*, but is copyhold, it will be repugnant. 1 *Sal.* 185, 6.

So land, held of a manor, which is *ancient demesne*, may be frank-fee. 1 *Rol.* 321. *l.* 11. * See 11 *Hen.* 4. 86. *per cur.* Yet if frank-fee be recovered in a court of *ancient demesne*, it is a disseisin. 30 *Ed.* 3 *Aff.* 3. 4 *H.* 6. 79.*

As, if it be held of such manor by chivalry. *F. N. B.* 14. *C.*

(C.) When they become Frank-fee.

(C. 1.) By Act of the King.

SO, if land, which is *ancient demesne* come to the king, it becomes frank-fee. 1 *Rol.* 324. *l.* 35.

And so remains, though the king afterwards grant it to a subject for life, or in fee, with rent, or without rent reserved. 1 *Rol.* 324. *l.* 40, 42. 326. *l.* 6. *F. N. B.* 13. *C.*

And therefore, to prove land frank-fee, it is sufficient to shew the feoffment, or charter of the king. *F. N. B.* 13. *C.*

Or, that it is held of the king, as of another manor or honour, &c. *F. N. B.* 13. *C.*

(C. 2.) By Act of the Lord.

So, if tenant in *ancient demesne* enfeoff his lord, the land becomes frank-fee.

Or, if the tenancy escheat to him.

Or,

Or, if the lord disseise the tenant. 1 *Rol.* 325. l. 5.

4 *Inst.* 270.

So, if before the *β.* 18 *Ed.* 1. 1. *quia emptores terrarum*, the lord enfeofed another of the land holden of his manor to hold by chivalry; for all land in *ancient demesne* is by socage only. *F. N. B.* 14. *B. C.* 13 *D.* 4 *Inst.* 270.

So, if the lord enfeof another of the tenancy by charter; for the services are thereby extinct. 1 *Rol.* 324. l. 45. 326. l. 7.

Or, release to the tenant all his right in the tenancy. 1 *Rol.* 324. l. 50. 4 *Inst.* 270.

Or, confirm his estate to hold by other services. 1 *Rol.* 324. l. 52.

Or, by less or the same services; for afterwards he shall hold by the deed. 1 *Rol.* 325. l. 23, 25, 30, 32.

So, if the lord enfeof another of the tenancy, saving the ancient services. 1 *Rol.* 325. l. 13.

Or, lease to him for life, though it be without deed. 1 *Rol.* 324. l. 49.

So, if the lord grant the services of his tenant to another, and the tenant attorn. 1 *Rol.* 325. l. 2. 4 *Inst.* 270.

So, if the lord acknowledge a fine in a *monstraverunt*, and thereby abridge the services. 1 *Rol.* 325. l. 20.

So, if the lord acknowledge a fine *sur conuzance de droit come ce*, &c. of the tenancy. 1 *Rol.* 325. l. 37.

Or, join with the tenant in a fine of the land upon a *warrantia charte*. 1 *Rol.* 325. l. 35.

(C. 3.) By Act of the Tenant.

So, if land, which is *ancient demesne*, be recovered in the king's courts in a *præcipe quod reddat*, or an assise, it becomes frank-fee. *F. N. B.* 13. *C.* 1 *Rol.* 324. l. 21.

So, if a fine or common recovery be levied of it. *F. N. B.* 13. *C.* 1 *Rol.* 324. l. 13. 4 *Inst.* 269.

Though it be a fine *sur grant & render*, without execution. 1 *Rol.* 324. l. 15.

Or, a fine upon release with warranty; for the tenant is stopped by it. 1 *Rol.* 324. l. 17.

Or, without warranty. *Dub.* 1 *Rol.* 324. l. 23.

Though the fine be erroneous: as, if it be levied without original, &c. for it is only voidable. 1 *Rol.* 324. l. 28.

Though the fine be of land in *ancient demesne* holden of a manor of the king. 1 *Rol.* 326. *N.*

So, if a plea be removed out of the court of *ancient demesne*, because the lord denies right. *R.* 1 *Rol.* 325. l. 17.

*But if in a writ of right close in *ancient demesne*, the demandant make his protestation to sue in the nature of assise of ward; the tenant plead in abatement of the writ, and by judgment it is abated, the demandant bringeth a writ of false judgment, in which the writ is affirmed to be good, the court of *C. B.* shall proceed as the inferior court should have done; and although judg-

judgment be given to recover the land in the *C. B.* yet the land is not frank-fee, but remains *ancient demesne*, because the beginning and foundation thereof was in *ancient demesne*. 4 *Inst.* 270.

If after the land be made frank-fee, there be a recovery of it in the court of *ancient demesne*, it is *coram non iudice*, and void. *Kit.* 97. b.

(D) When not.

But, if the lord disseise his tenant, the land becomes frank-fee only at the election of the tenant. *F. N. B.* 12. E. 1 *Rol.* 325. l. 7.

If the king grant a manor of *ancient demesne* to another, the lands held of the manor are not frank-fee. 1 *Rol.* 324. l. 30.

So, a fine in the king's court in a *warrantia chartæ* does not make the land frank-fee; for the land does not pass by it. 1 *Rol.* 324. l. 25.

So, if the tenant plead to a real action in the king's court, the land is not frank-fee 'till judgment there. 2 *Rol.* 325. l. 50.

So, a judgment in the king's court, upon a false judgment in the court of *ancient demesne*, does not make the land frank-fee. *Kit.* 97. a. 4 *Inst.* 270.

(E) How restored to be Ancient Demesne.

(E. 1.) By Cesser of the Act which made them Frank-fee.

And if land become frank-fee by any act, when that act is determined, or avoided, it becomes *ancient demesne* again: as, if land in *ancient demesne* come to the king, and afterwards be re-granted to be held of the manor again. *Kit.* 97. b.

If the lord release his tenant from the services for a certain time, after the time expired the land is *ancient demesne* again. 1 *Rol.* 325. l. 47.

So, if he confirm the estate of the tenant for his life, after his death it is *ancient demesne* again. 1 *Rol.* 325. l. 42.

So, if he confirm the estate of a disseisor of his tenant, after the entry, or recovery of the tenant, it is *ancient demesne* again. 1 *Rol.* 326. l. 14.

So, if the king seize the land and grant it to another, after the patent repealed, it is *ancient demesne*. 1 *Rol.* 326. l. 25.

So, if by feoffment, &c. it be made frank-fee, it remains *ancient demesne* as to all, who claim *paramount*. 1 *Rol.* 326. l. 20.

If the tenant in *ancient demesne* enfeoff, and the king confirm it, the lord may avoid it. 1 *Rol.* 326. l. 30.

If there be a fine, or recovery of land in *ancient demesne* held of the king, it may be avoided by writ of *disceit*. 1 *Rol.* 327. P.

(E. 2.)

(E. 2.) By Writ of Disceit.

So, if there be a fine, or recovery of land in *ancient demesne*, it remains frank-fee only 'till it be reversed by a writ of disceit.

1 Rol. 326. K.

But the lord may have a writ of disceit to avoid a fine, recovery, or judgment. *F. N. B. 98. A. 2 Inst. 216. 10 Co. 50. a.*

4 Inst. 270. Tho. Ent. 448. Lut. 751. Mo. 6.

And the lord may have a writ of disceit to annul such fine, though he be only tenant for life in the seigniorie. *F. N. B. 99 E.*

So, after his death, he in the reversion shall have it. *F. N. B. 99 E.*

So, a termor shall have it to avoid the fine, for his time at least.

1 Rol. 327. l. 7. Semb. Lut. 713.

And therefore, it is not necessary to shew, what estate the lord has in the manor. *R. Lut. 713. 1 Sal. 210.*

And if his estate be determined, it must be shewn on the other side. *1 Sal. 210.*

The lord may have a writ of disceit within a year, or after.

1 Rol. 327. Q.

So, he may have it twenty years after, or more; for it is not within the statute *4 H. 7. or 32 H. 8.* nor barred by non-claim within five years. *Pl. Com. 370. b. Vide in Fine, (l. 1, &c.)*

[Writ of disceit by the king, after upwards of 59 years. *Rex v. Mead, M. 28 G. 2. 2 Wils. 17.*]

So, he may have writ of disceit, though the remainder in fee be limited to the king. *Semb. 3 Leo. 12.*

And if land, of which a fine is levied, be part in *ancient demesne*, and part out of it, it shall be reversed for the part in *ancient demesne* only. *1 Rol. 327. R.*

But if the lord of the manor, after the fine release to the conuzee, he shall not have a writ of disceit. *3 Leo. 12.*

The writ of disceit may be against the terre-tenant, and all who have any estate in the land in possession, reversion, or remainder. *Lut. 713.*

Or, against the terre-tenant, and the conuzors and conuzees of the fine. *Lut. 713. Berd. pl. 94. 1 Sal. 210.*

And if the conuzor or conuzee be dead, it may be against his heir. *R. Lut. 713. 3 Lev. 416. 1 Sal. 210.*

If the terre-tenant be named in the writ, it is sufficient, though the others are omitted: for the others may be warned by *scire facias*. *Semb. Lut. 713. Tho. Ent. 449.*

If one defendant dies, the writ does not abate. *Vide in abatement, (H. 35.)*

The form of a writ of disceit. *Vide Lut. 711. 750.*

The form of the count upon it. *Vide Lut. 751.*

The count may say, that the plaintiff is seised of a manor of *ancient demesne*, that lands there are pleadable by writ of *right close*, that the defendants or those under whom they claim, levied a fine for recovery in *C. B. ad exheredationem, &c.* *Lut. 751.*

And

And it is not necessary to say, what estate the plaintiff has in the manor. *Lut.* 713. *1 Sal.* 210. *Vide supra.*

So it is sufficient to say, that the lands are pleadable in *curia manerii*, without more. *Lut.* 713.

Or, in *curia manerii per parvum breve de reſſo claſſo.* *Lut.* 714.

Or, in *curia manerii before ſuch ſuitors, &c.* *Lut.* 713.

But a fine of lands in *ancient demesne* cannot be annulled by a *ſcire facias* brought by the lord, directed to the juſtice of the ſame court, but he ought to proceed by an original writ of diſceit.

R. 3 *Lev.* 419.

To a writ of diſceit the defendant may plead, that the manor is frank-fee *absque hoc quod eſt de antiquo dominico.*

That the land was *placitabilis ad communem legem*, and not *per parvum breve de reſſo.* 2 *Inſt.* 217.

Or, the defendant may confeſs the action. *Lut.* 752.

[If defendants confeſs the declaration and writ of diſceit to be true by their plea, and the lord, who ſues, remit the damages, he may have judgment on motion. *Rex v. Mead, M.* 28 *G.* 2. 2 *Wilſ.* 17.]

* But all the parties to the recovery, demandant, tenant, and vouchee, muſt be before the court. 2 *Bl. Rep.* 1170.*

If a fine or recovery be avoided by writ of diſceit, it ſhall be totally avoided, and the tenant reſtored to his land again. 4 *Inſt.* 270.

And the parties to the fine or recovery ſhall be fined and impriſoned for the diſceit upon the court. 4 *Inſt.* 270.

[For ſuffering a common recovery of lands, being *ancient demesne*, whereof the king is now ſeiſed, defendants confeſs the action, the king's attorney remits the damages and prays judgment, the court give judgment *niſi*, no cauſe is ſhewn, and judgment entered. *Rex v. Firebrace, Rex v. Comyns. Barnes* 258.]

So, if a fine be annulled by a writ of diſceit, it ſhall be void, not only *quoad* the lord, but to all intents; for it was, *coram non judice*, and the conuſor ſhall have the land again. *Per Litt. & Needham* 8 *Ed.* 4. 6. *a. Bro. Ancient Demesne* 39. *F. N. B.* 98. *A.* 1 *Rol.* 327. *S. Cro. El.* 471. *R.* *Lut.* 713. 4 *Inſt.* 270. 1 *Sal.* 210. 3 *Leo.* 12.

If part of the land in a fine be *ancient demesne*, part frank-fee, it may be annulled for part. 3 *Leo.* 120.

Yet if the conuſee has a releaſe or confirmation of this eſtate after the fine, it ſhall be good. *F. N. B.* 98. *A.* 3 *Leo.* 12.

And after reverſal of the fine, the heir of the conuſor ſhall not enter upon the tenant of the freehold, without a *ſcire facias.* *R. Cro. El.* 472. 1 *Leo.* 250. *Semb.* 3 *Leo.* 120.

(F) What Privileges the Tenants there shall have.

(F. 1.) Shall be exempt from Juries.

BEFORE the conquest, and since, the king had houses of husbandry upon his demesnes, and stocks for the provision of his house, and his tenants there by their tenure ought to mow, till, reap the corn upon the land, &c. and therefore they ought to have many privileges. 2 *Inst.* 542, 3. *F. N. B.* 14. C. 4 *Inst.* 269.

And therefore, they ought not to be impanelled upon a jury, out of the manor of *ancient demesne*, if they have no other lands elsewhere, for which they may be charged. *F. N. B.* 14. E. 2 *Inst.* 542. 4 *Inst.* 269. **Doug.* 190.*

But, they are not excused from being constables. *R.* 1 *Vent.* 344.

(F. 2.) Shall be free from Expences of Knights in Parliament.

So, they ought to be exempt from the expences of knights in parliament. *F. N. B.* 14. E. 228. C. 2 *Inst.* 543. 4 *Inst.* 269.

(F. 3.) From Tallage.

So, they ought to be exempt from taxes, and tallages granted by parliament, if they are not specially charged. *F. N. B.* 14. E. 4 *Inst.* 269.

(F. 4.) And from Toll, &c.

So, from toll passage, or other duties for buying and selling in fairs, or markets, throughout all *England*. *F. N. B.* 14. E. 228. A. 1 *Rol.* 321. l. 20. 2 *Inst.* 221. *Lut.* 1145. 4 *Inst.* 269.

So, from pontage, and like duties. *F. N. B.* 228. B.

And this privilege extends as well to tenants who hold of a subject, as of the king. *F. N. B.* 228. A.

To tenants in fee, for life, for years, or at will. *F. N. B.* 228. D. 1 *Rol.* 322. C. *Adm. Lat.* 1146.

So the lord himself shall have the privilege. *F. N. B.* 228. B. but it seems that he ought to be tenant also and live there. *Rol.* 322. D. *Sem.* that the lord shall have it. *Lut.* 1146.

And though toll has been paid by the tenant there for a long time, yet his privilege remains. 2 *Inst.* 654.

But tenant in *ancient demesne* shall not have privilege to be free from toll, &c. where he trades generally as a common merchant, but only where he buys, or sells goods out of his tenement, or to be used there, or for the maintenance of his family within the *ancient*

*ancient demesne**. *Semb. cont. F. N. B. 14. E.* But the writ to be free from toll says, *de bonis & rebus suis in eadem villa praestand.* *F. N. B. 228. A. acc. 9 H. 6. 25. b. 19 H. 6. 66. b. Cont. 7 H. 4. 44. b. Acc. 2 Inst. 221. & Hill. 14 Ed. 1. there cited. Acc. R. acc. 28 Eliz. 1 Rol. 321. B. R. acc. 1 Leo. 233. 2 Leo. 191. Cro. El. 227.*

Tenant in *ancient demesne* may have a writ *essendi quietus de tolloneo.* *F. N. B. 228.*

And all the tenants there may join in such writ, as in a *monstraverunt*; or each may sue it for himself. *F. N. B. 228. B.*

And may have an action upon the case for taking toll. *2 Leo. 190.*

And need not prescribe for the privilege; for it is incident to their estate. *Lut. 1146.*

And it is sufficient to say, *that he is tenant and inhabitant within the manor of D. which is de antiquo, dominico, &c.* *Lut. 1146.*

That he ought to be free from toll, generally, without saying, *for goods to be used there*; for if they are for merchandize, it shall be shewn on the other side. *Lut. 1146.*

And need not alledge notice, that he was tenant in *ancient demesne*, though it will be more sure to do it. *Lut. 1147.*

(F. 5.) Shall be sued within the Manor.

(F. 5.)
When *ancient demesne*
is a good
plea.

So, tenant in *ancient demesne* ought not to be sued, or compelled to appear in any court out of the manor. *2 Inst. 543. 4 Inst. 269.*

And therefore, in all actions, where a recovery against tenant in *ancient demesne*, would make his land frank-fee, there *ancient demesne* is a good plea. *1 Rol. 322. l. 19.*

As, in all real actions. *1 Rol. 322. l. 20. 4 Inst. 270.*

So in an assise. *1 Rol. 322. l. 33.*

In an assise for rent out of land in *ancient demesne.* *Dy. 8. pl. 14.*

Unless the assise be by tenant by statute merchant, &c. where only the term is recovered. *Vide post, (F. 6.)*

So, in actions where the interest of the land is bound, or the realty by intendments may come in debate.

As, in an ejectment. *Per 2 J. Warb. cont. Cro. El. 826. R. 5 Co. 105. Hob. 47. 4 Inst. 270. Adm. 1 Sal. 185.*

[Motion to plead it in ejectment must be made the first four days. *Barnes 331, 336, 187.*]

[Affidavit that the lands are reputed *ancient demesne* is sufficient. *Barnes 185.*]

[It must shew that lessor of plaintiff has freehold, for lessee of a term cannot sue there. *Doe v. Roe, T. 33, 34 G. 2. 2 B. M. 1046.*]

* *F. N. B. 14 Ed.* does not seem contra; it is a marginal note concerning the privilege to be free, and concludes with a *qu.* if they shall be quiet for all things bought and sold, which seems to imply that they should not; but *2 Inst. 221.* is express that the privilege shall be confined to such goods as arise out of the tenement, &c. and the reason of the thing requires that it should be so.

[The court will not allow tenants in possession in ejectment to plead ancient demesne, on affidavit that the lands are holden in ancient demesne, and holden of the manor of G. if it does not allege that the manor of G. is holden in ancient demesne, and that there are suitors in the court. *Ibid.*]

[In ejectment it was allowed without affidavit of the fact. *Goodright v. Shuffill*, T. 12 G. 2 *Ld. Raym.* 1418.] * But this has since been over-ruled. 3 *Wils.* 51. *

In replevin. 5 Co. 105. a. *Hob.* 47. 4 *Inst.* 270. 21 *Ed.* 4. 3. a. R. 46 *Ed.* 3. 1, 2.

In a writ of *mesne*. 5 Co. 105. a. 4 *Inst.* 270.

In admeasurement of pasture; for, by the admeasurement of the common, the land becomes frank-fee. 1 *Rol.* 322. l. 40.

In partition, though the land be not directly demanded. R. 1 *Rol.* 322. l. 45. R. *Ray.* 249.

In account against a guardian in socage, or bailiff. 5 Co. 105. a. *Hob.* 47. 4 *Inst.* 270.

In a writ of ward. 5 Co. 105. a. *Hob.* 47.

In waste at the common law. *Hob.* 47.

In an action by the lord himself against his tenant, *ancient demesne* is a good plea. 24. 1 *Rol.* 323. l. 50. *Semb.* F. N. B. 12. E.

In an action founded on a statute, which concerns the right of the land directly. *Vide post*, (I.)

Ancient demesne may be pleaded after a release of a default upon the return of a *grand cape*. 1 *Rol.* 324. H.

So, after a deliverance made in *replevin*; but not after a general imparlance. 1 *Rol.* 324. l. 7.

At what time, and how it shall be pleaded, *Vide in Abatement*, (D. 1, 9.)

But, in waste upon the statute of *Glocester*, *ancient demesne* is (F. 6.) no plea; for the court there cannot award a writ to the sheriff to *When not.*

acquire of the waste, and a recovery in it does not make the land frank-fee. 2 *Inst.* 306. R. *per three J.* 1 *Rol.* 323. l. 20.

Semb. cont. Cro. El. 826. *Semb. cont.* *Hob.* 47, 8.

Nor, in an assise by a tenant by statute merchant, &c. for the term only is recovered, and the lord is not disinherited, nor the nature of the land altered. 2 *Inst.* 397. Mo. 211. 1 *Rol.* 323. l. 7. *Cont.* 5 Co. 105. b.

Nor, in trespass, though the land may come in debate; for the court there cannot hold plea *contra pacem*. 1 *Rol.* 322. l. 47, 323. l. 30. 5 Co. 105. a. *Hob.* 47. *Dub. Lat.* 83, 4. *See.* 4 *Inst.* 270. 46 *Ed.* 3. 1.

Nor, in *detinue* of charters. 1 *Rol.* 323. l. 3.

Nor, in a *quare impedit*. 1 *Rol.* 323. l. 15. for the court there cannot write to the bishop. *Hob.* 48.

Nor, in an action upon the *ss.* 5 R. 2. *Hob.* 47. R. 21 *Ed.* 3. a.

Nor, in debt in B. for damages recovered in *ancient demesne*.

Nor, in a *warrantia charta*. Dan. 658.

Vol. I.

K k

[Ancient

[Ancient demesne is not pleadable, where damages only are recoverable, or in an action *contra pacem*, or *vi et armis*. *Rodd v. Ld. Conningby, T. 1723. Bunb. 132.*]

So, it is no plea for a lessee for years. *1 Rol. 323. l. 40. 4 Inst. 270.*

Nor, for the lord, where the manor itself is demanded; for the manor and demesnes are not *ancient demesne*. *Vide ante, (B.)*

Nor, for a copyholder of the manor. *R. 3 Lev. 405. R. 1 Sal. 186.*

And if there be an action against the lord and others, the others cannot plead it. *1 Rol. 323. l. 45. 41 Ed. 3. 22.*

(F. 7.) **How it shall be tried.** If an issue be, whether land is *ancient demesne* or not, it shall be tried by the book of domesday. *9 Co. 31. a. 1 Sal. 57.*

The book of domesday ought to prove the very land to be *ancient demesne*, as it is alledged; for, if the issue be upon the manor of *B. in the county of N.* if domesday has, the manor of *B. in the county of L.* it is not sufficient. *R. Hob. 188.*

If it be not under the title *de terra regis* there, it is not *ancient demesne*. *1 Sal. 57.*

But if the question be, whether the land be parcel of a manor in *ancient demesne*, it shall be tried by the country. *9 Co. 31. a. 1 Sal. 57.*

And in an assise, *ancient demesne* was tried by the recognitor of the assise. *2 Inst. 397.*

(G. 1.) The Court of Ancient Demesne.

THE court of *ancient demesne* is a court baron, and not a court of record. *4 Inst. 269.*

And though a writ of *right close* be directed to the lord, or bailiffs, yet the suitors only are judges. *6 Co. 11. b. 3 Leo. 63. 4.*

And therefore pleading a suit there, *coram A. & B. ballivis & C. & D. seſſatoribus*, is bad. *Semb. Lut. 714.*

But *coram A. & B. ballivis & seſſatoribus*, is well; for it shall be intended that they are bailiffs, and suitors also. *Lut. 714.*

So, *coram seneschallo seſſatoribus & domesmen*. *Lut. 773.*

So the suitors there may act by attorney, though they are judges. *R. 1 Sal. 341.*

(G. 2.) In what Cases, and how it shall hold Plea.

The court of *ancient demesne* shall hold plea by writ of *right close*, in all cases where a tenant in fee, in tail, for life, or in dower of tenements in *ancient demesne* is ousted or disseised. *F. N. B. 11. F.*

And the tenant ousted or disseised may have a writ of *right close*, directed to the lord, or his bailiff, commanding him to do right in his court. *F. N. B. 11. F.*

So his heir may have it. *F. N. B. 11. F.*

And after the writ delivered to the lord or the bailiffs, the demandant shall make protestation to sue in form of an assize of *mort d'ancestor*, assize of *novel disseisin*, or in the nature of what writ he pleases. *F. N. B. 11. M. N.*

And he may have a writ of *right close*, for common of pasture. *F. N. B. 11. I.*

Or, for stopping a way, or such like. *F. N. B. 11. K.*

So he may have an ejectment there. *Mo. 451.*

So, if the lord himself oust his tenant, he may have a writ of *right close*, or an action at the common law, at his election. *F. N. B. 12. E.*

And after such protestation, the process shall be according to the nature of the process in the same writ at the common law. *F. N. B. 11. N.*

And the defendant shall appear and plead, as he shall do in such writ sued against him at the common law. *Ibid.*

So, upon a writ of *right close*, a man may levy a fine, or suffer a common recovery in the court of *ancient demesne*. *Dy. 373. 2 Inst. 514, 515. Lut. 779, 781.*

And a common recovery there bars an estate tail. *Kit. 97. a.*

So a fine there, will be of the same effect as a fine in *C. B.* would be of land which is frank fee, by the common law. *Per Holt inter Hunt & Bourne. (Reported Comyns's Reports, 128.) 1 Sal. 340.*

And therefore, will make a discontinuance of an estate tail. *R. inter Hunt and Bourne. H. 1 Ann. B. R. (Reported Comyns's Reports, 128.) Lut. 781. Dy. 373. 1 Sal. 340.*

But it will not be a bar to the entail. *Acc. 4 Inst. 270. Dub. Dy. 373. R. 1 Sal. 340.*

Nor is a fine in *ancient demesne*, a bar to him who has right, if he does not make his claim within five years; for by the *st. 4 H. 7. 24.* no fine, unless it be with proclamations, is a bar, and there cannot be a fine with proclamations in the court of *ancient demesne*, but it remains at the common law, in which non-claim was taken away by the *st. 34 Ed. 3. 16.* *R. Lut. 781. Sal. 340.*

A fine in *ancient demesne*, may be *sur concessit* as well as *sur co-nuissance de droit*. *Lut. 774, 775.*

And if it be pleaded in *placito conventionis secundum consuetudinem monerii*, it is sufficient, though it is not said to be upon a writ of *right close*. *R. Lut. 781.*

(G. 3.) In what, not.

But a man cannot implead any one for land in *ancient demesne*, without a writ of *right close*. *Reg. 9. a. Kit. 96. b. F. N. B. 11. M.*

Except by a bill of fresh force, which he may have in the court of *ancient demesne* within forty days after disseisin, without any writ sued. *F. N. B. 13 E. Kit. 96. b.*

So a man cannot implead any there in a *redisseisin*, or a *post disseisin*; for the court there cannot order, that the sheriff or coroners do inquire. *Kit. 96. b. 4 Inst. 270.*

Nor, in waste upon the statute of *Glocester*; for they cannot command the sheriff to inquire of the waste; and it cannot be supplied by the officer there. *2 Inst. 306. 2 Sand. 254. Vide ante, (F. 6.)*

Nor, in a *quare impedit*; for they cannot write to the bishop. *1 Rol. 323. l. 15.*

So none shall be impleaded in *ancient demesne*, if there be only one suitor there; for he cannot do right. *4 Inst. 270.*

So a copyholder of land in *ancient demesne* cannot have a writ of *right close*; but ought to sue by bill in the lord's court, and make protestation to sue in the nature of what writ he will. *F. N. B. 12. B. R. 2 Cro. 559.*

And if a false judgment be given, he shall sue by petition to the lord. *F. N. B. 12. B. Vide Copyhold, (P. 1.)*

Nor, can he join in a *monstraverunt*. *F. N. B. 16. F.*

But, if he does join, the writ abates only as to him. *Ibid.*

If the land be frank-fee, they cannot hold plea, but a recovery there is void. *Semb. Mo. 451. Kit. 97. b. 98. A.*

Yet, frank-fee ought to be pleaded there, otherwise the jurisdiction is admitted. *Mo. 451.*

And after plea by the defendant there, upon a writ to proceed to execution, they ought to do so. *Vide post, (G. 4.)*

(G. 4.) How the Lord shall be compelled to do Right.

If the lord will not hold his court, the tenant in *ancient demesne* may have a writ out of *chancery*, commanding him to hold it, and to proceed according to law. *F. N. B. 12. D.*

And if then he will not hold it, he may have an attachment returnable in *B. R.* or *C. B.* and shall recover his damages. *F. N. B. 12. D.*

So he may have a writ to the lord commanding him to do right, and upon that an *alias*, *pluries*, and *attachment*. *F. N. B. 12. E.*

Or, a writ to the sheriff, commanding him to take four knights, and to go to the lord's court, and see that right be done. *F. N. B. 12. E.*

And if the sheriff refuse, he may have an *alias*, *pluries*, and *attachment* against him. *F. N. B. 12. E.*

And thereupon, the sheriff may compel right to be done. *Dub. F. N. B. 12. E.*

So there may be a writ to the suitors to proceed to execution upon the judgment there. *Mo. 451.*

If there be a writ to the suitors, &c. to proceed to execution, they cannot return, that the land is frank-fee; for the jurisdiction is admitted by the appearance, and plea of the defendant there. *R. Mo. 451.*

And if it be frank-fee, the suitors are not trespassers, where upon a writ to them they award execution. *Mo. 451.*

Other-

Otherwise, if the land be frank-fee, and they award execution without such writ. *Ibid.*

(G. 5.) When the Plea shall be removed by *Recordare*.

The demandant in *ancient demesne* cannot remove the plea out of the court there for any cause. *F. N. B. 13. B. 4 Inst. 269.*

But the defendant may remove the plea by *recordare*, for any cause which makes the land frank-fee. (*Which vide ante*, (C. 1. 2, 3.) *F. N. B. 13. B. 4 Inst. 269.*

Yet he ought to prove the land to be frank-fee in *C. B.* when it is removed; otherwise it shall be remanded. *F. N. B. 13. C.*

And if the cause suggested be, *quia tenet ad communem legem*, generally, he may shew any cause in *C. B.* which proves the land frank-fee; otherwise if the special cause be suggested. *F. N. B. 13. F. 4 Inst. 270.*

So he may remove the plea, if there are no suitors in *ancient demesne*. *2. F. N. B. 13. G. 4 Inst. 270.*

So, for default of trial there; as, if the defendant plead a foreign plea, a *superfedeas* goes to the lord of *ancient demesne* to surcease.

As, if he plead bastardy, &c. for the court there cannot write to the bishop. *Reg. 9. a.*

If he vouch a foreigner to warranty, the defendant ought to sue a *warrantia chartæ* in *C. B.* and then he shall have a *superfedeas* to the lord in *ancient demesne* to surcease, till the plea in *C. B.* be determined. *F. N. B. 13. H.*

So, if the demandant and tenant put themselves upon the grand assize, a *superfedeas* goes, &c. *F. N. B. 13. G.*

If the lord in *ancient demesne* proceed, after the plea removed by *recordare*, a *certiorari* goes to *C. B.* to certify the tenor of the record removed into the *chancery*, and upon that an attachment lies against the lord to answer to the king, and the party in *C. B.* *F. N. B. 13. H.*

So, if the lord proceed after a *superfedeas*, an attachment lies against him, to answer to the king, and the party in *C. B.* for contempt. *F. N. B. 14. A.*

H) *Monstraverunt*. When, and how it shall be sued.

If the tenants in *ancient demesne*, who held by charter, and not by copy, are distrained for other services or customs, than they have used to do, they may have a *monstraverunt* directed to the lord, commanding him, that he do not distrain them for other services or customs. *F. N. B. 14. D. F. 4 Inst. 269.*

And after the writ to the lord, they may have a *monstraverunt* directed to the sheriff, that he cause the lord to suffer his tenants to be in peace, and not distrain them, &c. *F. N. B. 4. F.*

Upon this writ to the sheriff, he may with the *posse* resist the lord, or make *rescous* of the distress. *F. N. B. 15. B.*

So the neighbours, by the commandment of the sheriff, may justify a resistance, or a *rescous* to the lord. *Ibid.*

And, if the lord distrain them again, the tenants may have an attachment against the lord in *B. R.* or *G. B.* and recover their damages. *F. N. B. 15. C.*

And, if he distrain them pending the suit, they may have special attachment with a commandment to the sheriff to make deliverance. *F. N. B. 15. I.*

If the tenants sue a *monstraverunt*, they are not named by their proper names, but generally, *homines manerii*, &c. *F. N. B. 15. D.*

But in an attachment they are named by their proper names. *F. N. B. 15. D.*

Or, at least, the tenants distrained after prohibition by a *monstraverunt*, are named by their proper names, and the others by the general words, *homines manerii*. *F. N. B. 15. F.*

Yet if one of them will not sue, he may be severed. *F. N. B. 15. G.*

And his nonsuit does not abate the writ, nor prejudice his companions. *Ibid.*

Or one may sue alone by his proper name, naming the other tenants generally. *F. N. B. 15. H.*

In a *monstraverunt* the plaintiffs upon the attachment make several counts, for they recover damages severally; for one may have more damage than another. *F. N. B. 16. A.*

Or they may have but one count. *F. N. B. 16. A.* Yet the damages shall be severally assessed. *F. N. B. 16. B.*

And it is not necessary to alledge the day or place of the distress in the count. *F. N. B. 16. A.*

None shall recover damages but the tenant named by his proper name. *F. N. B. 16. B.*

The lord shall not be put to answer, 'till the court be certified by the treasurer and chamberlains of the *exchequer*, that the manor is *ancient demesne*. *F. N. B. 16. C.*

And the plaintiffs shall have a special writ to the treasurer and chamberlains, to make the certificate. *Ibid.*

(I) When Ancient Demesne shall not be bound by Act of Parliament.

IF by statute a new action be given, which concerns the right or possession of the land directly, and does not lie in the count of *ancient demesne*, yet it cannot be brought in the king's court for land in *ancient demesne*. *R. Hob. 47.*

(K) When it shall.

BUT lands in *ancient demesne* shall be subject to all charges imposed upon them expressly by act of parliament.

So, regularly, all general statutes extend to them. *4 Inst. 27.*

So, if they are not named, they shall be subject to a statute which charges the possession, where the land itself is not demand directly in the king's court. *Hob. 48.*

As, they shall be extended on a statute merchant, or staple.
R. Mo. 211. 2 Inst. 397. 4 Inst. 270.
 So, upon an *elegit*. *R. Hob. 48. 5 Co. 105. b. 4 Inst. 270.*
 So, in debt against an heir upon the obligation of his ancestor,
 land in *ancient demesne* shall be asslets. *Hob. 48. Vide asslets, (A.)*

A N N.

(A.) The Year; how computed.

THE year consists of 365 days. *Co. Lit. 135. a.*
 And though there be six hours, and several minutes over in
 each year, which every fourth year make another day, and there-
 fore there are 366 days in such year, yet by the *St. de Anno Biffex-*
tili 21 H. 8. that day shall be reckoned of the same month in
 which it happens, and that, with the preceding, shall be ac-
 counted as one day. *Co. L. 135. b. 2 Rol. 521. l. 35.*

Half a year consists of 182 days; for there shall be no regard
 to a part, or fractions of a day. *Co. L. 135. b.*

So a quarter of a year consists but of 91 days. *Co. L. 135. b.*
 for the law does not regard the six hours afterwards. *2 Rol. 521.*
l. 40.

(B.) The Month.

A Month is solar or computed according to the calendar,
 which contains thirty, or thirty-one days; or lunar, which
 consists of twenty-eight days. *Co. L. 135. b.*

In all cases where a statute speaks of a month, it shall be in-
 tended of a lunar month, which contains twenty-eight days, and
 not of any other. *R. 2 Rol. 521. l. 50. Acc. 2 Cro. 167.*

As, upon the *st. 2 Ed. 6. 13.* which requires proof of a sug-
 gestion for a prohibition to be made within six months: the com-
 putation shall be made by lunar months. *Cont. 2 Rol. 521. l. 52.*
R. cont. Hob. 179. R. cont. Lit. 19. Acc. 4 Mod. 186.
Cont. 2 Mod. 58. Vide infra.

*So, where by the *st. 20 G. 2. c. 37.* a sheriff is not liable to
 be called upon to return process, unless within six months after
 the expiration of his office, they shall be lunar months, and the
 day on which he goes out of office, shall be reckoned part of the
 six months. *Doug. 463.**

So, in an information for using unlawful games for seven
 months, contrary to the *st. 33 H. 8. 9.* *R. 2 Rol. 522. l. 1.*

In an indictment for selling ale and beer at another rate, than
 was set by the mayor and chief officer of any town for six
 months, pursuant to the *st. 23 H. 8. 4.* *R. 2 Rol. 522. l. 5.*

So,

So, where the *fl.* 27 *H.* 8. 16. requires enrolment of a deed within six months; it shall be intended of lunar months. 2 *Cro.* 167. *Vide Bargain and Sale, (B. 8.)*

In an information upon the stat. for retaining servants in livery, which gives a penalty of *per month*, it shall be intended of a lunar month. *Semb. Cro. El.* 835.

So, where the *fl.* 31 *Ed.* 3. 35. requires a leet to be held within a month after *Easter*, or *Michaelmas*. 2 *Cro.* 167. *Vide Leet, (C.)*

So, where by the *fl.* 17 *Car.* 2. two justices of peace may commit for six months a non-conformist, who comes within five miles of a corporation; it shall be computed by lunar months. *R.* 32 *Car.* 2. *Holcroft's case.*

So, where by the *fl.* 1 *W. & M.* 8. a bishop, parson, &c. who neglects oaths, &c. shall be suspended for six months; it shall be intended of lunar months. *Dub.* 4 *Mod.* 95. But *Semb. acc. Skin.* 314.

So, where a deed speaks of a month, it shall be intended of a lunar month; as, if there be a condition of re-entry for non-payment of rent within a month. 2 *Cro.* 167.

So, if a covenant be to pay 500*l.* within a month. *R.* 4 *Mod.* 185.

[In a contract to deliver stock, the computation must be by lunar months. *Jocelyn v. Haswkins, T.* 7 *G. Str.* 446.]

[But if money is lent for nine months, it shall be understood calendar months. *Titus v. Lady Preston, M.* 12 *G. Str.* 652.]

In all legal proceedings (as in time to plead, &c.) a month is four weeks. *Tullet v. Linfield, H.* 4 *G.* 3. 3 *B. M.* 1455.]

But where a statute speaks of a year, it shall be computed by the whole twelve months according to the calendar, and not by lunar months. 2 *Inst.* 320. 2 *Cro.* 167.

So, where a statute speaks of six months in a matter which concerns ecclesiastical proceedings, it shall be computed by calendar months: as, for proof of a suggestion in prohibition. *R.* 2 *Rol.* 521. *l.* 52. *Hob.* 179. *R. Lit.* 19. *Cont.* 4 *Mod.* 186. *Vide supra.*

So in a *quare impedit*, where by the *fl.* *W.* 2. plenarty is no plea, *si breve infra tempus semestre impetretur*, the computation shall be by calendar months. *R.* 6. *Co.* 61. 2 *Cro.* 141, 167. *Rel.* 100.

(C) The Day, Hour, &c.

A Day is natural, which consists of twenty four hours, or artificial, which contains the time from the rising of the sun to the setting. *Co. L.* 135. *a.*

Hora constat ex 40 momentis. 2 *Inst.* 318. (*Q.* if not 60.)

A day is usually intended of a natural day; as, in an indictment for burglary, &c. *Co. L.* 135. *a.*

In an appeal. 2 *Inst.* 318.

Vide Tempts, (B. 1, &c.—C. 1, &c.)

ANN, JOUR, ET WAST.

(A) When the King shall have the Year,
Day, and Wast.

BY the *st. Prer. Reg.* 17 *Ed.* 2. 16. *Rex habebit omnia catalla felonum, et si habeant liberum tenementum statim capiatur in manus domini regis, et rex habeat omnes exitus ejusdem per unum annum, et unum diem, et tenementum illud vastabitur et destructur de domibus, boscis, gardinis, &c.*

The wast was to shew a detestation of the crime. *St. P. C.* 190. 2 *Inst.* 37.

The year and day was originally by allowance of the lord of the fee, who was intituled to the escheat, who allowed the king the year and day, by way of composition for the wast. *St. P. C.* 190.

And by *Mag. Chqr.* 9 *H.* 3. 22. it is declared, that the king shall have it only for one year and one day.

But now it is settled, that the king shall have the year, day, and wast, if the lord does not make composition for it. *St. P. C.* 190. *b. Dub.* 2 *Inst.* 37.

And that for petit treason, or felony. *St. P. C.* 190. *b.*

And in all cases, where the felon had an estate not impeachable for wast: as, if he was seised in fee, or in tail. *St. P. C.* 190. *b.*

If he was seised in right of his wife, the king shall have the year, day, and wast, in the lands of the wife's inheritance. *St. P. C.* 190. *b.* 2 *Rol.* 315.

So the king shall have the year, day, and wast, though the land was ancient demesne. *St. P. C.* 191. *a.*

Though a felon being indicted have a charter of pardon. *St. P. C.* 191. *a.* *Cont. ibidem.* *Vide Post,* (B.)

Though the felon was killed in a pursuit after an escape out of sanctuary, and this matter be presented before the justices in *Eyre.* *St. P. C.* 191. *a.*

(B) When not.

BUT if the felon have only for life, or for years, the king shall not have the year, day, and wast. *St. P. C.* 191. *a.* 2 *Inst.* 37.

So, if the felon was seised only as mortgagee, subject to a condition. *St. P. C.* 191. *a.*

Or, was seised by fresh disseisin. *St. P. C.* 191. *a.*

Or, held at fee-farm rendering the true value. *St. P. C.* 191. *a.*

Or, was tenant in tail. 2 *Inst.* 37.

So the king shall not have the year, day, and wast, of the lands of a clerk convict. *St. P. C.* 191. *a.*

Nor,

Nor, where a felon after indictment has a charter of pardon. *St. P. C. 191. a.*

Nor, if there be lord, *mesne*, and tenant, and the *mesne* is attainted. *2 Inst. 37.*

Nor, where the land is not of the value of 40*d.* or such small value; because the suing it out of the king's hands will cost more than the value of the land. *St. P. C. 191. a.*

The commencement of the year, day, and waft, shall be presently after office found, and not before.

And therefore, if office be not found till 20 years after the attainder, yet the king shall have it for a year and day afterwards, though the words of the *St. Prer. Reg. 16.* are *Statim capiatur in manus domini regis.* *St. P. C. 191. a.*

And it is intended, that the king shall have the first year. *F. N. B. 144. K.*

And, all the profits in the *mesne* time are also the king's; for the lord cannot have the *escheat*, till the king has had his year, day, and waft. *St. P. C. 191. a.*

And therefore, a writ lies to inquire if the king has had the year, day, and waft, before the lord shall have the land out of the king's hands. *St. P. C. 191. b.*

And if it be found, that the king had the lands for a year and a day, it is sufficient; though it be also found, that *B.* took the profits for that year; for he shall answer for them to the king. *F. N. B. 144. K.*

The prerogative to have the year, day, and waft, is a profit annexed to the king's crown. *St. P. C. 191. b.*

And therefore, none can claim it by reason of a franchise. *St. P. C. 191. b.*

Nor, can the king grant it to another before office found. *St. P. C. 191. b.*

But after the king is intitled by office, he may grant or commit the land to another during the year and day, and to take the profit of the waft. *St. P. C. 191. b.*

A N N A T E S.

Vide Tenths, (B.)

A N N O Y A N C E.

Vide Justices of Peace, (B. 24, &c.)—Leet, (L. 12, 13.)—Action upon the case for nuisance.—Parliament, (G. 2.)—Prerogative, (D. 36.)—Sewers, (C. 3.)

A N N U I T Y.

(A) What shall be a good Grant.

(A. 1.) In Respect of Continuance.

AN annuity is an annual sum of money granted to another in fee, for life, or years, which charges the person of the grantor only. *Co. L. 144. b.*

Or, it may be due by prescription.

So it may be granted to another for every year that he shall be resident in such a town, or in such a parish; for it is annual at his will. *1 Rol. 226. l. 10.*

Or, every *Easter* day that he comes to such an house; though perhaps he never will come there. *1 Rol. 226. l. 15.*

So it may be granted at every twenty years, though it be not annual. *1 Rol. 226. l. 20.*

If a grant be to *A.* for life to be paid at the feast of *Easter*, or twenty days after, and he dies after *Easter* within twenty days; the executor shall not have it; for the last day was the time of payment. *Dal. 1.*

[If the annuitant of an annuity payable half yearly, *since the last term of payment,* dies before the half-year is compleated, nothing is due for the time he lives; so the purchaser from *A.* who has an interest for life in stock (which was originally secured on a mortgage, but transferred by order of chancery) if *A.* dies before *Christmas* dividend becomes due, is intitled to nothing for the time *A.* lived after the last dividend; otherwise, had it remained, on the mortgage. *Pearly v. Smith, T. 1745. 3 Atkyns 260.*]

(A. 2.) In Respect to the Conveyance.

*By *§. 17 G. 3. c. 26.* In every deed, instrument or other assurance, whereby any annuity or rent-charge shall be granted, the consideration really and *bonâ fide* (which shall be in money only) and also the name or names of the person or persons by whom and on whose behalf the said consideration or any part thereof shall be advanced, shall be fully and truly set forth in words at length; otherwise such deed, &c. shall be void. *f. 3.**

*And a memorial of every deed, bond, &c. whereby any annuity or rent-charge shall be granted, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall, within 20 days of the execution of such deed, &c. be inrolled in chancery: every such memorial containing the day of the month and the year when the deed, &c. bears date, and the names of all the parties, and for whom any of them are trustees, and all the witnesses, and setting forth the annual sum or sums to be paid, and the names of the person or

or persons, for whose life or lives the annuity is granted and the consideration of granting it; otherwise such deed shall be void. *f. 1.**

*And the clerks of the inrollments in chancery shall keep a particular roll on which such memorials shall be entered in the order of time in which they come into the office, and there shall be specified on the roll the certain day, hour, and time on which the memorial is brought into the office, and a certificate of the inrollment shall be granted when required. *f. 5.**

*And, before the entry of judgment on any warrant of attorney for recovering or securing the payment of any annuity or rent-charge granted before the passing of the act, and before execution sued out, or *action* brought on any such judgment entered at the time of passing the act, or on any deed, &c. then executed for the purposes aforesaid, a like memorial; otherwise judgment on such warrant of attorney, execution on such judgment or proceeding on such *action* shall respectively be void. *f. 2.**

A. sci. fa.* to revive a judgment obtained *before* the passing of the act is an *action* within the meaning of this section; therefore for want of compliance with the requisites of the act before suing out such *sci. fa.* an execution thereon was set aside on motion. *1 Term Rep. 267. 268.

*If any part of the consideration be *returned* to the person advancing the same; or if the consideration or any part of it be paid in *notes*, and any of the notes with the privity and consent of the person advancing the same be not paid when due, or be cancelled or destroyed without being first paid; or if the consideration or any part of it be paid in goods; or if any part of the consideration be retained on pretence of answering the further payment of the annuity or any other pretence: on application to the court in which any action shall be brought for the payment of the annuity, or judgment entered, to stay proceedings on the judgment or action, the court may order the deed, &c. to be cancelled, and the judgment, if any has been entered, to be vacated. *f. 4.**

Though by comparing this section with *S. 1 & 2*, it appears that the legislature meant to put *notes* duly paid with a proper allowance for the time they had to run, on the same footing with *money*, and that money is only contradistinguished from goods; yet the notes must be particularly and circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. *3 Term Rep. 288.**

*But if the security be set aside for want of complying with the *formalities* of the act, the consideration of an annuity being partly a debt *antecedently* due for goods sold, and the residue money paid at the time of granting it, may be recovered back by the grantee in an action of assumpsit; but where the consideration is goods sold *at the time* of granting the annuity, whether the value can be recovered. *Qu. 1 Term. Rep. 732.**

*And

*And where an annuity bond granted by two becomes void for want of being registered, the grantee cannot recover any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in a receipt for it; for a receipt is not *conclusive* evidence against the party who signs it. *2 Term Rep. 366.**

*A deed not registered according to the directions of this act is absolutely *void*, and not merely voidable. *2 Term Rep. 603.**

*And therefore where a person against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed, which was given in consideration of an antecedent debt, and a small annuity payable from thenceforth, the sheriff may return *nulla bona*. *Id. Ibid.*

(A. 2.) By what Words granted.

If a man grant an annuity to another to be received out of his coffers, yet this is sufficient to charge his person, and the subsequent words shall be rejected. *1 Rol. 227. l. 51.*

Or to be received out of a bag of money. *1 Rol. 227. l. 46.*

Or to be received of a stranger. *1 Rol. 227. l. 48.*

So if a man grant a rent out of his manor, when he has not any manor; this is a good annuity. *1 Rol. 227. l. 42. Vide Rent. (C. 8.)*

Or if he grant a rent of 20l. per annum to be received of his tenants in D. when he has not any tenant there. *1 Rol. 227. l. 40.*

Or an annuity to be received out of his land in D. and he has only a rent there. *1 Rol. 227. l. 33.*

So if he grant an annuity to be paid out of his rent. *1 Rol. 227. l. 30.*

So if a man grant a rent of 20l. to be paid out of customs assigned to him by the king, this cannot be a rent, for a rent does not issue out of a rent; but it shall be an annuity. *Vide 1 Rol. 227. l. 20.*

Or the queen, out of customs assigned to her for dower. *1 Rol. 227. l. 20.*

So if one grant a rent out of land, which is afterwards evicted by an elder title, the grantee shall have an annuity.

So if a rent-charge be determined by the act of God, or of the law. *Co. L. 148. a.*

So if a man grant a rent out of land in which he has nothing, *proviso* that he be not charged for this in a writ of annuity, it shall be a good annuity; for the proviso being repugnant, is void. *Co. L. 146. a. 2 Bul. 149.*

If a feoffor reserve 20 marks rent, and afterwards the feoffee by another deed bind himself to pay 20 marks per annum for the lands, which he had by his feoffment; this shall be an annuity, if it is other than the sum reserved.

So if a man grant a rent-charge out of his land, the grantee has election to take it as a rent, or as an annuity. *Lit. Sec. 219. Bul. 148. Vide post, (C. 1.) Vide Rent, (C. 8.)*

And

And if the grantor be seised for the life of another, who dies, and the grant is for his own life, it shall be an annuity. *R. 2 Bul. 148.*

If a man grant a rent-charge, or an annuity, in fee, the grantee, his heirs, or assigns, may have a writ of annuity for it. *Co. L. 144. b.*

If an abbot, prior, parson, &c. with assent of the ordinary grant an annuity for a valuable consideration, the grantee shall have a writ of annuity. *1 Rol. 226. l. 50.*

Or if the ordinary, with assent of the parson and patron, grant it. *1 Rol. 226. l. 53.*

If two grant an annuity to another, the grantee shall have but one annuity. *Co. L. 144. b.*

If two grant a rent, *proviso that it shall not charge the person of one of them*, a writ of annuity lies only against the other. *Co. L. 146. b.*

But if *A.* being seised in fee, he and *B.* grant a rent-charge out of land; both are chargeable in a writ of annuity. *Co. L. 144. b.*

And if they grant an annuity, and oblige themselves, *et utrumque nostrum*, they are chargeable severally, or jointly for it. *Co. L. 144. b.*

(A. 3.) By what, not.

But for a rent created upon a reservation, a writ of annuity does not lie. *1 Rol. 226. l. 35. Co. L. 144. a.*

Though the feoffee, or lessee by deed, reciting the rent reserved, grant that the feoffor, &c. for his greater security may distrain for it upon other land. *1 Rol. 227. l. 3.*

So if a rent be granted for owelty of partition, a writ of annuity does not lie. *Co. L. 144. b. 1 Rol. 227. l. 7.*

Or in lieu of dower; for it shall be real, in the nature of the land, for recompence whereof it was granted. *R. Poph. 87.*

So if a rent-charge be granted, with a proviso, *that it shall not charge his person*, a writ of annuity does not lie. *Lit. Sect. 220.*

Or if upon a grant of a rent-charge, there be a defeasance, *that it shall not charge his person.* *Co. L. 146. b.*

Or if the grant be, *that the grantee shall distrain for the rent.* *Lit. Sect. 221.*

So if the king grant an annuity, and does not grant it out of the excise or other revenue, it shall be void; for it cannot charge his person. *1 Sal. 58.*

(B) Who are bound to Payment.

IF a man grant an annuity to another in fee, his heir shall not be bound to the payment without an express lien.

And therefore, if the grant does not say, *for him and his heirs*, the annuity determines by his death. *1 Rol. 226. l. 25.*

Though

Though he afterwards binds himself and his heirs to warranty ; for that does not enlarge the grant. *1 Rol. 226. l. 30.*

And therefore, the heir cannot be charged in a writ of annuity due by prescription ; for it does not appear what lands his ancestor had at the time of the grant. *Co. L. 102. a.*

But if a parson, &c. before the *fl. El.* had granted an annuity with assent of the patron and ordinary for a valuable consideration, his successor was bound.

So, if it were granted with assent of the ordinary, without the patron. *Co. L. 344. a.*

So, the successor shall be charged for arrears in the time of his predecessor ; for the charge is upon the church. *R. Cro. El. 810.*

(C) Remedy.

(C. 1.) When a Writ of Annuity, or Distress, at Election.

IF a man grants a rent-charge out of land to another, without a proviso to exempt his person, the grantee has an election to distrain, or to have a writ of annuity for it. *Lit. Sect. 219.*

But he has no election, where rent is reserved upon a feoffment, &c. or granted for owelty of partition, with a proviso, that it shall not charge his person, &c. *Co. Lit. 145. Vide ante, (A. 3.)*

If the grantee brings a writ of annuity, he discharges the land from distress, if he appears, and counts at the return of the writ. *Co. L. 145. a.* (C. 2.) What shall be a determination of the election.

Though he does not afterwards proceed upon it. *Co. L. 145. a.*

So, if he distrain for the rent, and avow for it in a court of record ; he determines his election to claim it afterwards as an annuity. *Co. L. 145. b.*

So, if he bring an assize, and count for the rent in a court of record. *Co. L. 145. a. 1 Rol. 228. l. 50.*

So, if a rent be granted to two, and one distrains and avows in his own right, and makes conusance as servant of the other ; this shall be a determination of the election for both. *Co. L. 146. a.*

If the grantee of a rent-charge purchase part of the land, whereby the whole rent is extinguished, he shall not afterwards have a writ of annuity ; for he determined his election by his own act. *Co. L. 148. a.*

So, if a rent-charge be apportioned by act of law, he shall not afterwards have an annuity ; for that must be brought upon the grant for the whole, or nothing. *Co. L. 150. a.*

But if a man bring annuity, and do not count upon it, it is not a determination of his election. *Co. L. 145. a.* (C. 3.) What not.

Though he enter his writ in a court of record. *Ibid.*

So,

So, if he bring an assize for the rent, and do not make his plaint upon it in a court of record. *Ibid.*

Or, distrains, and does not avow for the rent. *Ibid.*

So, if the wife of a grantee of a rent-charge demand her dower of the rent, the heir cannot claim it as an annuity; for he cannot make his election by claim. *Co. L. 144. b.*

So, he cannot afterwards have an annuity for the two parts, for the whole shall be an annuity, or a rent-charge. *Ibid.*

So, if a grant of a rent be not for him and his heirs, and after the death of the grantor, the grantee brings a writ of annuity against the heir, and counts or proceeds to judgment, he may afterwards distrain as for a rent; for the heir not being liable, he had not any election. *R. Dy. 344. b.*

If the lessee of a tenant *pur auter vie* grant a rent-charge for fifteen years, and the life dies, the grantee may afterwards have a writ of annuity; for his death, which is the act of God, does not determine his election. *R. Poph. 86.*

When Debt lies for an Annuity, and when not,

Vide Dett, (A. 6, 7.)

(D) Writ of Annuity.

A WRIT of annuity may be sued by *justicies* in the county, or in *C. B. F. N. B. 152. B.*

The process in *C. B.* shall be summons, attachment and distress. *F. N. B. 153. A.*

And by the *§. 23 H. 8, 14.* Upon default of distress, process of outlawry.

The original is the same as in debt; and therefore upon a summons, or bill in *placito debiti*, the plaintiff may declare in annuity. *Cont. Tel. 208. R. acc. 4 Mod. 143.*

An annuity shall be brought in the county, where the grant was made. *F. N. B. 152. E.*

Or, if it be payable by a religious house, corporation, or parson, where the house or church stands, or where seisin of it was alledged. *Ibid.*

So it may be sued in *Wales* by bill; for it is a personal thing. *R. Cro. Car. 171. Jon. 214.*

So in the *exchequer*, or *B. R.* by bill. *Jon. 215.*

(E) Declaration.

IF an annuity be brought against the grantor himself, the grant ought to be shewn. *Win. Ent. 8. Co. Ent. 49. b.*

If by an assignee, he ought to shew the grant, and the assignment to him by the grantee. *Win. Ent. 8.*

If by an executor, the grant and the death of the grantee. *Win. Ent. 10.*

li

If by the husband against the terre-tenant after the death of his wife, for the arrears in his wife's life-time, he ought to shew the grant, and the descent of the land, and the death of his wife.

Win. Ent. 11.

If there be a count for an annuity due by prescription, the plaintiff ought to shew the prescription, and a title to it in himself. *Co. Ent. 48.*

The declaration in annuity shall say, *quem ei debet*, though the annuity be of a robe, and not of money. *F. N. B. 152. C.*

And if the grant be for life, the declaration shall say, *virtute cujus seiscitus fuit in dominico suo ut de libero tenemento for his life*, *Co. Ent. 49. R. Cro. Car. 171. 2 Bul. 148.*

And though this demand sounds like a demand of a rent-charge, it shall be well; for his misprision of the law shall not prejudice him. *R. 2 Bul. 148.*

But the declaration ought not to be *in placito debiti*. *Carth. 355.*

(F) Pleas.

TO the declaration the defendant may demur, if the plaintiff does not shew a good title. *Win. Ent. 9.*

So after Oyer, he may confess the action, and thereupon there shall be judgment against him presently. *Win. Ent. 11.*

So the defendant may plead *riens arrear*. *Win. Ent. 10.*

Or, *non concessit*. *Win. Ent. 11. R. 2 Leo. 13.*

Or, if the declaration is founded upon a prescription, he may traverse the prescription.

Or deny the prescription directly. *Co. Ent. 49. a.*

But it is no plea, *that the church is drowned, destroyed, &c.* for it is due in respect of the profits. *R. 1 Mod. 200.*

That nothing passed by the deed; for perhaps it was not *in esse* before. *R. 2 Leo. 13.*

So, the defendant may plead a release of all personal actions in bar of an annuity. *Jon. 214.*

Or, if a rent-charge be granted, which the grantee afterwards elects to have as an annuity, a release of actions real made before the election. *Jon. 214.*

But a release of real actions is not a good plea in an annuity generally. *Cont. Co. L. 285. Acc. Jon. 214.*

*Nor, though there be a covenant to pay, if demanded by plaintiff personally, *that no personal demand was made.* *2 Wilf. 71.*

That the rent was levied by distress. *Co. Ent. 49. b.*

That the defendant enfeoffed the plaintiff of the land charged with the rent.

If an annuity was *pro consilio*, *that the plaintiff refused his counsel.*

But it is not a plea, *that the grantee was attainted and imprisoned and could not resort to him for counsel.* *R. Dy. 2. a.*

If the defendant makes default after appearance, before judgment there shall be a *distingas ad audiendum judicium*. 2 H. 4. 1. b.
Vid. Bankrupt (D. 3. 34.)

(G) Judgment.

THE judgment in an annuity shall be for the annuity, and the arrearages before the action, and after. *Co. Ent.* 50. a. *Cro. Car.* 436.

So the jury ought to give damages for non-payment, be the annuity claimed by deed, or by prescription. 1 *Rol.* 88.

And if the verdict does not find damages, it shall be helped by a release of damages. *R.* 1 *Rol.* 88.

But if the plaintiff demands an annuity due at *Michaelmas* last, and there was another quarter in arrear at *Christmas* before the action brought, the judgment shall not be for the quarter due at the feast of *Christmas*, for that shall be intended to be satisfied. 1 *Rol.* 225. l. 15.

And this quarter shall never be recovered by an annuity.

So if the annuity determines *pendente lite*, there shall not be judgment for the arrearages; for the writ fails for ever. *Co. L.* 285. a. *R.* 2 *Leo.* 51.

(H) Execution.

IF the plaintiff recover in annuity, he may have an *elegit*, or a *fiери facias* for the arrearages recovered, within the year. 1 *Rol.* 229. l. 30.

So after the year the plaintiff shall have a *scire facias*. 1 *Rol.* 229. l. 31.

But the plaintiff after a judgment in annuity shall never have an annuity again for the arrearages recovered. 1 *Rol.* 229. l. 27.

Nor for the arrearages incurred after the judgment, but he shall have a *scire facias* upon the judgment, which is always executory. 1 *Rol.* 229. l. 37.

Annuity pro consilio.

Vide Condition, (K. 4.)

A N S W E R.

Answer to a Bill in Equity.

Vide Chancery, (K. 1, &c.—L.—M.—T. 6)—*Dismes*, (M. 16.)
—*Evidence*, (C. 3.)

To Articles of Impeachment.

Vide Parliament, (L. 23.)

A P O T H E C A R Y.

Vide Physicians, (C.)

A P P E A L.

(A) When it lies.

(A. 1.) For the Death of a Man.

AN appeal is an accusation of another in a legal form, for a crime by him committed. *Co. L. 123. b. 287. b. St. P. C. 58. b.*

Anciently an appeal lay for high treason. *St. P. C. 78. a. 3 Inst. 5, 132.**

But it seems to be taken away by the *st. 1 H. 4. 14.* And now, if murder be made treason, an appeal does not lie. *R. Dy. 50. a. (a)*

[It lies for petit treason, and charges that *felonice proditorie et ex malitia præcognita murdravit. Fother 323.*]

And it now lies only by an heir upon the death of his ancestor; or by a wife upon the death of her husband. *2 Sho. 375.*

By *magna charta 9 H. 3. 34. Nullus capiatur propter appellum femine de morte alterius quam viri sui*; and therefore, the heir who brings the appeal must be a male. *H. P. C. 182.*

Or, an hermaphrodite, if the male sex be predominant; otherwise not. *2 Inst. 69.*

So he ought to be immediate heir; for if the deceased leave issue a daughter, his brother shall not have an appeal.

(2) Note; it does not appear that the appeal of treason is taken away by this or any other statute; Lord Hale indeed says, (vol. i. 359) that this kind of proceeding by appeal in the king's ordinary courts had been long disused, and is now wholly taken away by *st. 5 Ed. 3. c. 9.* and *25 Ed. 3. c. 4.* The first of these statutes only says, that none shall be attached, &c. against the form of the great charter, and the law of the land; the latter goes indeed a little farther, and says, that none shall be taken by petition or suggestion to the king or to his council, but by indictment or presentment, or by process made by writ original at the common law; but it is conceived that a writ of appeal is a writ original; therefore if an appeal of treason was part of the common law, these statutes do manifestly not take it away; because, as Lord Hale says, that course of appeal continued still in parliament, therefore by *1 H. 4. c. 14.* all appeals in parliament are wholly taken away; and this is all that is done by this statute, except declaring that all appeals of things done out of the realm, shall be tried and determined before the constable and marshal. *Vid. 2 Hawk. 239.*

So if the next heir die before, or after an appeal commenced, his heir shall not have an appeal. *H. P. C.* 182. *Dub. Dy.* 69. *a.*

So if the blood of the heir be corrupted by attainder, he shall not have an appeal. *H. P. C.* 182.

Yet if he die after judgment in an appeal, his heir shall demand execution. *H. P. C.* 182.

So if the deceased leave a wife, who dies within a year before an appeal commenced, the heir of the deceased shall not have an appeal; for the action was once attached in another. *H. P. C.* 181.

Except, where the wife kills her husband. *H. P. C.* 182. *R. Cro. Car.* 531.

So an appeal may be brought by the heir, though he be an infant. *H. P. C.* 183. and the parol shall not demur. 2 *Inft.* 320. *Mod.* 461.

Or above the age of 70 years. *H.* 183. though the defendant in such case be ousted of battel. 2 *Inft.* 320.

Though he derives his blood by females. *H. P. C.* 183. * *Co. Lit.* 25. *b.* 2 *Inft.* 68.*

So if an appeal be against the heir himself, it may be by the next, as if the immediate heir had died without issue in the life of his ancestor. *H. P. C.* 182.

So an appeal lies by the wife upon the death of her husband. By the *st. magna charta*, 34.

And she may have an appeal, though she had eloped in his lifetime. (a) *H. P. C.* 181. * 1 *Inft.* 33.*

Though the husband was attainted. *H.* 181. 2 *Inft.* 69. * 3 *Inft.* 215. But in that case the heir cannot. 2 *Inft.* 69.*

But she ought to be a lawful wife; for *ne unq' accouple* is a good plea. *H. P. C.* 181. 2 *Inft.* 68. * 1 *Inft.* 33. *b.* *

And if she marry another, the appeal is lost for ever, though the second husband die before the year expires. *H. P. C.* 181. *Semb. Dy.* 88. *b.* 2 *Inft.* 68.

So if she marry after judgment, she cannot have execution. *H. P. C.* 181. 2 *Inft.* 69.

So if the wife be eloped or divorced, she cannot have an appeal. 2 *Inft.* 317. * 1 *Mod.* 130. 2 *Inft.* 68.*

The husband shall not have an appeal upon the death of his wife, but the heir. 3 *Mod.* 157.

There shall be no appeal by the *st. of Gloc.* 6 *Ed.* 1. 9. upon a death by misadventure, or *se defendendo*. 2 *Inft.* 317.

(A. 2.) For a Robbery.

So a man, who is robbed, may have an appeal of robbery or burglary. 2 *R.* 3. 22. *b.*

(a) To reconcile this with what is said a few paragraphs below, and which is certainly consonant to the old law, we must suppose she had returned and lived with her husband at the time of his death.

Or an appeal of larceny, if his goods are stolen. *H. P. C.*

184.

An appeal of robbery or larceny, may be by a woman, as well as a man. *H. P. C.* 184. 2 *Infl.* 68.

By an infant. *H. P. C.* 184.

By the master or servant, where the servant was robbed.

H. 184.

By the survivor, where the goods belong to several. *H.* 184.

By him who had possession of the goods, though he claims no property. 2 *R.* 3. 22. *b.* * But he must have the possession and not barely the charge, as a butler or cook, &c. 3 *Infl.* 108.

2 *Hawk.* 246.*

But a villein shall not have an appeal of robbery against his lord. *H.* 184.

Nor an executor or administrator for the robbery of his testator, or intestate. *H.* 184.

An appeal may be against the person who robs, * though it be an infant or feme covert, without taking notice of the husband.

2 *Hawk.* 247.*

Or if *A.* rob *B.* and *C.* rob *A.* it may be by *B.* against *C.* *St. P. C.* 61. *a.*

* When restitution shall be awarded. *Vide* 2 *Hawk.* 249, 250.*

(A. 3.) For a Rape.

So a woman ravished may have an appeal against the ravisher, upon the *fl. W.* 2. 34.

* Though she be attainted she may have the appeal after pardon. 3 *Infl.* 215.*

The appeal shall be by the woman ravished. *St. P. C.* 61. *b.*

And if she be a *feme covert*, she may sue without her husband.

Bro. Rape 1. *Cont. St. P. C.* 61. *a.* * 2 *Hawk.* 253.*

Or the husband and wife may join. *Bro. Rape*, 1. *St. P. C.* 61.

And by *fl. 6 R.* 2. 6. If the woman after the rape consent to the ravisher, her husband shall have the appeal; if no husband, her father; if no father, her next of kin may have it. *H. P. C.* 186.

If her next of kin commits the rape, her next after him shall have it.

But a woman shall not have an appeal of rape, if before, or afterwards she consents to the ravisher. 2 *Infl.* 433. * But though the consent after, the king shall have the suit. *Wesl.* 2. *c.* 34.*

So an appeal does not lie, for taking a woman, and marrying her contrary to the *fl.* 3 *H.* 7. 2. *Hut.* 3.

Appeal of Mayhem.

Vide Battery, (E. 4.)

(B) By

(B) By whom it lies.

AN appeal shall be by the wife of the death of her husband; and in every other case by the immediate heir male. *Vide Ante, (A. 1.)*

If the heir be an infant, he may be admitted to sue by guardian. *Mo. 461.*

And the infant himself cannot afterwards controul the proceeding, in court, or out of court. *R. 1 Sal. 176. *Vid. 2 Hawk. 240.* and the authorities there cited, which seem contrary.*

(C) Against whom it lies.

AN appeal lies against an infant. *H. P. C. 185.*

And against a monk, &c. without naming his sovereign. *H. 185.*

So against a wife, without naming her husband. *H. 185. St. P. C. 62. a.*

So against the husband and wife, though it be for a rape; for the wife may be aiding. *Bro. Rape, 2.*

So an appeal ought to be against all the principals and accessories together; for generally the plaintiff shall have but one appeal. *St. P. C. 65. b. R. 4 Co. 47. b. *2 Infl. 385.**

And therefore if he commences an appeal against *A.* and several other appeals against other persons for the same felony, all but the first abate. *St. P. C. 65. b.*

Though the plaintiff be nonsuited in the first, after appearance. *St. P. C. 65. b.*

Or the defendant in the first be convicted, or acquitted. *St. P. C. 65. b.*

But if *A.* be accessory in another county to a felony committed by *B.* there may be several appeals. *St. P. C. 65. b. Dy. 39.*

So if *A.* be accessory after the year and day, and an appeal commenced. *St. P. C. 65. b.*

So there may be an appeal against *A.* as principal, and also as accessory. *St. P. C. 65. b.*

So against *A. quod proditorie, & B. quod felonice murdravit. Cro. Car. 531.*

(D) At what Time it lies.

BY the common law, an appeal lay only, where the appellant had made fresh suit to apprehend, and convict the felon. *2 Infl. 319.*

But, by the *st. of Gloucester, 6 Ed. 1. 9.* An appeal shall not abate for want of fresh suit, if brought in a year and day after the fact done.

Which

Which statute is, by construction, restrained to an appeal for the death of a man.

And therefore, an appeal upon the death of a man may be within the year and day, though there be not any fresh suit. *2 Inst. 320.*

Within a year and day after the death, though the blow was given before. *2 Inst. 320.*

And if any be accessory half a year afterwards, it may be within a year and a day after his being accessory. *2 Inst. 320.*

If the year commences the 1st of January, it ends the 31st of December.

But after the year, a new writ shall not be allowed, though the first was destroyed. *R. 1 Sal. 177.*

And an appeal of robbery, &c. may be brought two or three years afterwards, if there be fresh suit. *H. P. C. 185. St. P. C. 62. b. *2 Hawk. 248.**

And what shall be fresh suit, shall be in the discretion of the judges. *H. 185. *2 Hawk. 249.**

So an appeal for a rape may be brought in a reasonable time; for though by the *st. W. 1. 13.* by which rape was made only a trespass, forty days are limited for the suit; yet, when it was made felony by the *st. W. 2. 34.* no time is limited for it. *H. P. C. 186.*

(E) In what County.

AN appeal must always be brought in the county where the felony was committed. *St. P. C. 63. a. Vide in Action, (N. 9)*

And therefore, for a death in *Wales*, it cannot be brought in a county adjacent. *R. Cro. Car. 247.*

If the stroke was in one county, and the death in another, it shall be commenced in either of the counties, and tried by a jury of both. *St. P. C. 63. a. 7 Co. 2. a. R. Dy. 46. a.*

And now, by the *st. 2 & 3 Ed. 6. 24.* it may be commenced and tried in the county, where the party died. *3 Mod. 121.*

An appeal for a robbery shall be brought in the county where the party was robbed. *St. P. C. 63. b. 7 Co. 2. c.*

And if the goods are afterwards carried into another county, an appeal for larceny may be brought there; but not for the robbery. *H. P. C. 184. 7 Co. 2. a.*

If they be carried into divers counties, an appeal for larceny may be brought in either of them. *7 Co. 2. a.*

If a woman be taken in one county, and ravished in another, the appeal for the rape ought to be brought in the county where she was ravished. *H. P. C. 186.*

Though the count mentions the taking in another county; for as to so much, it is surplusage. *St. P. C. 63. b.*

An

An appeal shall be in the county where the offence was committed, though it be within the *Cinque Ports*. *R. Tel. 12. Cra. Car. 247.*

(F) Before whom.

AN appeal by bill may be brought in the county court, before the sheriff and coroners. *Vide ff. 3 H. 7. 1. H. P. C. 171. St. 64. 2 Inst. 420. Vide in Officer, (G. 5.)*

Who can only take and enter the appeal and count. *2 Inst. 32.*

Then by *certiorari* directed to them, it shall be removed into *B. R.* *St. P. C. 64. b.*

So it may be by bill before the justices of *B. R.* against any one in *custod. mar.* or let to bail; for they are the sovereign coroners of the realm. *H. P. C. 179. St. 64. b. 2 Inst. 420. 17 Ed. 3. 13. a. R. Skin. 634.*

Or before justices of gaol delivery, against any in the gaol before them, or upon bail. *H. 179. St. 64. b. 2 Inst. 420.*

And the appeal by bill supposes the party to be in custody. *1 Sal. 61.*

But if any of the appellees are not in gaol, it shall be removed by *certiorari* into *B. R.* *St. 64. b.*

So if the justices of gaol-delivery do not determine the appeal, it may be removed. *Kelg. 90.*

So it may be before justices in *Eyre.*

And by the *ff. W. 2. 29.* Before justices of *oyer and terminer.* *2 Inst. 420.*

So before justices of *nisi prius.* *2 Inst. 420.*

So by the *ff. 1 H. 4. 14.* An appeal for a thing done out of the realm shall be before the constable and marshal, *H. P. C. 180.*

But an appeal does not lie before justices of peace. *2 ff. 65. a. Semb. 2 Inst. 420.*

Nor by the *ff. 1 H. 4. 14.* in parliament. *St. 65. a.*

An appeal in the county, or before justices of gaol-delivery may be removed into *B. R.* by the plaintiff or defendant, by *certiorari* out of *chancery*, or *B. R.* *St. P. C. 70. a.*

The *certiorari* ought to be directed both to the sheriff and coroners. *St. P. C. 70. a. 64. b.*

And ought to agree with the appeal in all respects, *St. P. C. 70. a.*

(G) How the Proceeding shall be.

(G. 1.) By Writ.

AN appeal shall be by writ, or by bill. *H. P. C. 179. 2 Inst. 420.*

* And the writ is an original out of *chancery* returnable in the king's bench only. *2 Hawk. 232. 5 Bur. 2643.**

A writ

A writ of appeal by the wife on the death of her husband.
Vide Co. Ent. 57. a. 2 Sho. 375.

By the heir on the death of his ancestor. *Co. Ent. 53. b. 56. b. 4 Mod. 287.*

A writ of appeal on a robbery, burglary, or larceny.

A writ of appeal ought to be general against principal and accessories without distinction; for it shall be distinguished in court, which are principals, which accessories. *St. P. C. 70. a.*

And it shall be against the principal and all accessories before or after, 'till the writ sued; for if there are several writs against them, all but the first abate. *R. 4 Co. 47. b.*

* But it seems that the plaintiff needs not to count against any but those who appear: *vid. as to this matter. 2 Hawk. 266, 267.**

So it may be against one for petit treason, and another for murder, in the same count. *R. Jon. 425. Cro. Car. 531.*

But a writ of appeal shall not be against a man as accessory, without naming any principal. *Semb. Dy. 133. b.*

And upon this writ pledges must be returned, and if the sheriff return, *that he has not found any*, they may be found in court. *Rust. 46. * And they ought to be real pledges. Strange 855. Vid. 4 Mod. 287.**

[If the writ runs *quia A. fecit vos secur. &c.* instead of the usual form *si A. fecerit nos secur. &c.* and the sheriff takes no security, and no pledges are given, the writ ought to be superseded, but *B. R.* cannot do it. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.] (a).*

* The appellant has till the *quarto die post* to appear. *4 Mod. 99. 5 Bur. 2798.**

At the return of the writ, the defendant if he appears shall be brought to the bar, and then the appeal shall be arraigned by the appellant's counsel in *French*, and afterwards read in *Latin* by the Secondary, and the appellee shall plead to it. *1 Sid. 324. 2 Jon. 210. 1 Sal. 61, 64.* (G. 2.) How arraigned upon it.

So if only one of the appellees appear, and the others make default; he shall plead.

At the return the appellant may make a warrant of attorney, and afterwards appear by attorney, but the warrant shall be avowed by him in court in person, or proved by witnesses. *2 Jon. 210. Vid. Attorney, (B. 5, 6.) 5 Bur. 2793.*

The defendant before plea may demand *Oyer* of the writ and return. *4 Mod. 288. * But this Oyer is not by having a copy, but by the secondary's reading. 5 Bur. 2793.**

* The appellee may have a special imparlance, to plead any special matter, if the court thinks it reasonable. *Id. Ibid. **

* And when he is brought up at the expiration of the imparlance, and pleads by parol, he may have time, at the discretion

(a) Note; it seems by the case in *Strange*, that if there be any circumstance recited in the writ contrary to the truth of the fact which may be a good cause for superseding, the proper mode of proceeding is an application to the lord chancellor, who ought to grant a *superfedeas*.

of

of the court, to have his plea drawn up and delivered in form. *Id.* 2798—but it must be entered as of the day when he pleads. *Id. ibid.* *

And if the sheriff has not returned his writ, the court obliges him to make a return presently. 2 *Bul.* 19.

(G. 3.)
Pleas in
Abatement.

If the writ be defective, the defendant may plead in abatement, but may also plead over to the felony. *Co. Ent.* 57. a. 4 *Mod.* 289. Or may omit pleading to the felony; for it is well both ways. *R. Sho.* 47. *Vide Abatement*, (1. 10.)

The plea in abatement shall be recited by the counsel in *French.* 1 *Sid.* 324. *Cro. El.* 69.

After plea, there may be a day by *dies datus*, but not by *imparlance*. 1 *Sid.* 325.

If the writ abates, it is peremptory, and the judgment shall be *quod defendens eat sine die*. *Co. Ent.* 57. a. 1 *Sid.* 325. *Carib.* 56.

And though the plaintiff have counted, he shall not proceed upon it; for the count depends upon the writ.

If the defendant appear in person, and afterwards plead by attorney, and it be demurred to, and the cause adjourned, it will be a discontinuance. *R.* 1 *Sal.* 59.

Vide Amendment, (2 C. 1.)

* The defendant may plead another writ of appeal pending for the same felony, if the plaintiff has appeared on it. *

* But he cannot plead a bill of appeal before the sheriff and coroner, before removal; but he may on removal by *certiorari* into *B. R.* if it appears by the record, that the same plaintiff hath appeared and sued it, as in praying process, &c. 2 *Hawk.* 276. *

* For other pleas in abatement, see title Abatement. *

(G. 4.) By Bill.

An appeal may be by bill before the sheriff and coroners in the county court, and afterwards removed in *B. R.* *Vide ante*, (F.)

So it may be commenced by a bill in *B. R.* against him who is in *custodia mareschalli*, or out upon bail. *Vide ante*, (F.)

If an appeal by writ abates, when he is in *custod' mar'* the plaintiff may afterwards proceed by bill.

And it is no plea, that a writ is depending. *Co. Ent.* 59.

So it may be removed by *habeas corpus* out of the *Cinque Ports*. 2 *Rol.* 478. *Tel.* 13.

And after removal into *B. R.* the plaintiff may declare in appeal against the defendant in *custod' mar'*. 2 *Rol.* 478.

So, if it come there upon a writ of appeal directed to the warden of the *Cinque Ports*; for that was void. *R. Cro. El.* 695. *Tel.* 13. *Co. Ent.* 59.

But, if he had declared before justices of gaol delivery, &c. before removal, he cannot declare *de novo in custodia mar'*. *R.* 2 *Rol.* 478.

So, if the defendants appear at the return of the writ of appeal, the plaintiff cannot declare against them *custod' mar'* before a com-

mittitur

mittitur entered upon the roll, (whereby he would waive his writ which was abateable.) *R. Cro. El. 605.*

And, if there be an appeal for murder or other offence against any one in *custod' mar'* who is arraigned, pleads, and is tried in the same term, it will be well upon the declaration only, though a bill be not filed. *R. 1 Rol. 536. l. 15.*

So, if he be arraigned and plead the same term, though he be not tried. *R. 1 Rol. 536. l. 20. Cro. Car. 532. Jon. 425.*

But, if the defendant in an appeal appears, and is not arraigned till another term, there ought to be a bill filed. *1 Rol. 536. l. 29. Cro. Car. 532.*

So, if he appears and pleads in the same term any plea, except not guilty, whereby an adjournment must be entered. *R. Cro. Car. 532.*

If an appeal and an indictment are depending against *B.* at the same time, and the appellant be ready to proceed; the court ought to proceed upon the appeal first. *Kel. 107.*

Vide Amendment, (2 C. 1.)

(G. 5.) Process for Non-appearance.

If the defendant in an appeal be not in custody, nor appears, if it be an appeal for death before the coroner in the county, it shall be commanded to a serjeant of the county, that he have his body at the next county; and if he is not found, an exigent shall issue against the principal, but it shall cease against the accessory 'till the principal be outlawed. *St. P. C. 67. a.*

So in *B. R.* after the first *capias* returned, an exigent issues in an appeal for death. *St. P. C. 67. a.*

But in an appeal for robbery there shall be two *capias's* before the exigent. *Ibid.*

So, since the *st. 25 Ed. 3. 14.* which in an indictment for felony gives two *capias's* before the exigent, there shall be but one *capias* in an appeal for death; and two *capias's* before the exigent in another appeal. *St. P. C. 67. a. Vide Indictment, (I.)*

If the sheriff upon the *capias* returns, *no pledges found, &c.* there shall be an *alias capias.* *Rast. Ent. 46.*

If an appeal be removed into *B. R.* by *certiorari*, and the defendant does not appear at the return; the plaintiff shall sue a *capias* against him, and so to an exigent without having a *scire facias.* *St. P. C. 70. b.*

So, by the *st. 8 H. 6. 10.* if the appellee be named of another county, after return of the first *capias*, another *capias* shall be awarded to the sheriff of the county, where he dwells, before the exigent issues. *Vide St. P. C. 68.*

And, by equity, to the lord of the county palatine, or his lieutenant, if the appellee dwells there. *St. P. C. 69. a.*

The second *capias* shall be returned in three or four months; and if the sheriff cannot find the appellee in his county, he shall make proclamation in two counties before return of the writ. *st. 8 H. 6. 10.*

IF

If appellees are outlawed, in error by both it shall not be reversed till both appear in person, and have a *scire facias* against the lords mediate and immediate. 1 *Sid.* 316.

By the *st. W.* 1. 14. an accessory in an appeal shall not be outlawed, till the principal be attainted. *St. P. C.* 46. a. 2 *Inst.* 183.

And therefore, in an appeal by writ, where it does not appear who are accessories till the declaration, and process goes against all together; after exigent against the defendants, the plaintiff cannot declare against any of them as accessory. *St. P. C.* 70. a. 46. a.

So, all the principals ought to be attainted before the accessory be outlawed. 2 *Inst.* 183.

If the appellee be in custody, when the appeal is removed into *B. R.* by *certiorari*, and the appellant does not proceed against him; the defendant may have a *scire facias* against him, and if he be warned and does not appear, he shall be nonsuited. *Kelg.* 91. *St. P. C.* 70. b. *Mod. Ca.* 219.

* If the appellee be in custody of any sheriff or gaoler, he may be brought up by *habeas corpus*, directed to such sheriff or gaoler. *Str.* 854. 5 *Bar.* 2645, 2648. *

So, upon two *scire facias*'s and *nihil* returned; but without a *scire facias* against the plaintiff he cannot be nonsuited, because he has no day in court. *St. P. C.* 70. b. 1 *Sal.* 61.

(G. 6.) Count.

When the defendant appears, the plaintiff shall count against him in person. *R.* 1 *Sal.* 64. 62.

If but one defendant appears, and the others make default, the plaintiff shall count against all. 4 *Co.* 47. b.

And upon appearance the defendants may be bailed. 1 *Sid.* 316.

* The court will bail in all cases after an acquittal on an indictment, unless the judge be dissatisfied with the acquittal. *Str.* 855. *

* But it is not of course to bail on an appeal; though the court will do it on any affected delay by the appellant in any subsequent stage of the proceeding. *Id.* 855, 856.

* And in an appeal by writ on the civil side, two bail only are required; but on the crown side by *certiorari*, there must be four. *Id.* *Ibid.* *

If the defendant appears at the day of the return, the plaintiff ought to count against him, though he does not return his writ. *R.* *Rast.* 46.

The plaintiff in an appeal for death may count against several upon several strokes. *St. P. C.* 80. b.

So, in an appeal for a rape against several, the plaintiff ought to charge all with the rape. *Ibid.*

And, if it be brought upon the *st. W.* 2. she need not count upon the statute. *St. P. C.* 81. a.

Otherwise, if it be brought upon the *st. 6 R.* 2. 6. by husband, father, &c. *Ibid.*

But it is sufficient to say, *contra formam statuti*, without alleging, that she consented to the ravisher. *Ibid.*

The

The count in an appeal ought to have as much certainty, and exactness, as an indictment.

And therefore, if the count does not shew the fact, with all the circumstances as exactly as it might, it is bad: as, if it does not shew, that it was by a wound, in what part of the body, of what depth, &c. if it be deep, &c. and that he died of the same wound within a year and a day. 2 Inst. 318.

If the wound be at one day or place, and the death at another, and the count concludes, *et sic at the first day or place felonice murderavit*, it is bad; for the felony is where he died. R. 4 Co. 42. a. b. 2 Inst. 318. R. Cro. El. 196.

If the death was without wound, the count ought to shew with what weapon, and all the circumstances as exactly. 2 Inst. 318.

If without weapon, it ought to shew how, by poison, drowning, strangling, &c. with all the circumstances. 2 Inst. 318.

If the count be of a death by a wound; he shall not be convicted, if the evidence be of a death by poison, drowning, &c. 2 Inst. 319.

If it be by the cousin and heir, he ought to shew how he is cousin. St. P. C. 81. a.

So in an appeal for burglary, if the count be *burgaliter*, it is bad; for it ought to be *burglariter*, or *burgulariter*. R. Co. 39. b.

In an appeal for robbery, it ought to shew the things of which he was robbed. St. P. C. 81. a.

And an appeal for a rape ought to say, *felonice rapuit*. Ibid.

So the count in an appeal shall abate, if the fact appears by the plaintiff's own shewing to be done by misadventure, or *se defendendo*. 2 Inst. 317.

But, by the *st. Gloc. 6. Ed. 1. 9.* an appeal does not abate as formerly, if the appelland count of the fact, the year, the day, the hour, the time of the king, the town where the fact was done, and with what weapon. 2 Inst. 317. St. P. C. 80.

And if it says, *circa such an hour* it is sufficient; though it cannot say, *circa such a day, or year*. 2 Inst. 318. 4 Mod. 290. 1 Sal. 59. Skin. 443. Cont. per three judges, 2 acc. 1 Bul. 82, 3. Dub. 3 Mod. 158.

And the precise day is not necessary; for he may be found guilty at a former, or subsequent day. 2 Inst. 318.

So it is not necessary to alledge the particular weapon; for proof of any other weapon is sufficient. 2 Inst. 319.

So, if the hour be omitted, it is not material. Semb. 4 Mod. 159.

So false *Latin* in the count does not hurt. Semb. 4 Mod. 159. 1 Sal. 328.

Nor dans, for *dedit vulnus*, being more certain. Semb. 4 Mod. 290, 292. 1 Sal. 60. Skin. 443.

Or the venue alledged in *parochia de D.* and not in the town. Semb. 4 Mod. 290. 1 Sal. 60. But afterwards R. cont. per three judges, Powell, acc. 11 Ann. 1 Sal. 60. D. cont. per Treby, 3 Mod. 158. 2 Inst. 319, except where it is in a city, where a parish is in nature of a town in the country. Dub. Carb. 17. Skin. 554.

So

So the count is sufficient, if it be against *A.* who gave the stroke, and *B.* who was assistant; though the evidence be that *B.* gave the stroke, and *A.* assisted him. 3 *Mod.* 121.

So surplage in the return, &c. does not hurt. *R. Skin.* 553.

(G. 7.) Pleas in Bar.

(G. 7.) To an appeal, the defendant may plead in bar of the felony, Not guilty. *not guilty.* *Cro. El.* 69.

If there are several defendants they may join, *et separatim dicunt quod ipsi non sunt culpabiles*, upon which several *venire facias*'s shall be awarded. *Co. Ent.* 57. b.

If an appeal charge only for manslaughter, a plea *quod feloniam, et murdrum non culp'* is well. *R. 2 Cro.* 283: *Tel.* 204.

So the defendant shall plead *not guilty*, though it was *se defendendo*, &c. for he cannot justify for death. 2 *Inst.* 316.

So, after a demurrer to the writ, return, and count overruled, he shall join issue. *R. Skin.* 554.

(G. 8.) So in an appeal of death, the defendant may join issue by Tender of battle. *Cro. El.* 69. *Vide Battle*, (A. 1.)

Or one defendant may tender battle, and another plead *not guilty.* *Cro. El.* 69.

So in an appeal by a wife, for the murder of her husband, the defendant may plead, *marriage to another husband.* *Dy.* 296. a.

(G. 9.) So the defendant may plead in bar, *that he was formerly convicted of manslaughter upon an indictment for the same felony, and had his clergy.* *R. 4 Co.* 46. a. *R. Kel.* 94, &c. 2 *Cro.* 283. *H.* 247.

Auterfelts convicted of manslaughter, and had clergy.

Or, *that he was convicted and prayed his clergy, though the court would consider whether it should be allowed*; for the act of the court does not prejudice the party in a case of life. *R. 4 Co.* 46. a. 3 *Inst.* 131. *Co. Ent.* 54. * 5 *Bur.* 2801. * *R. Kel.* 94. cont. 1 *Sid.* 316. 3 *Mod.* 157. *Dub. Carth.* 16, 17, 18. 2 *Sbo.* 375.

Though the conviction was after the appeal, if it be before the defendant is driven to plead. *R. 4 Co.* 47.

And if an appeal be sued after conviction, and before judgment given by the court, it is not a cause for staying judgment upon the indictment. *Kel.* 91.

So the court cannot deprive him of clergy, to give advantage to the appeal. *Kel.* 106, 108. *Cont.* 3 *Mod.* 158. 4 *Mod.* 100.

And if they do so, the conviction, and that he was ready to demand his clergy, is a bar to the appeal. *Kel.* 107. 1 *Sal.* 63. * 5 *Bur.* 2801. *

But, by the *st.* 3 *H.* 7. 1. if a felon, murderer, or accessory be acquitted on an indictment, or the principal attainted, &c. the wife or heir may have an appeal against the persons so acquitted or the principal so attainted, if they be alive and benefit of clergy before

before not had. And the justices shall not dismiss him, but remit or bail him 'till the year and day be past.

But he shall not be remitted or held to bail, if found guilty of manslaughter; for that is not within the *st. 3 H. 7. R. Kel. 25.*

And therefore, it is not a bar to the appeal, *that the defendant was indicted, if he be acquitted, for the same felony. H. 245.*

Or, *that he was attainted, if he had not benefit of clergy.*

Or, *that he was convicted by confession or verdict; for the st. 3 H. 7. allows an appeal, if he be acquitted or attainted, a fortiori if he be convicted. R. 4 Co. 46. a. Semb. 1 And. 68.*

So it is not a bar, if the indictment upon which he was convicted and had his clergy, was insufficient, and no judgment upon it. *R. 4 Co. 47. a. 2 Leo. 160. H. 247.*

So, if there was a judgment, when that judgment is reversed. *H. 247.*

So the defendant may plead, *an appeal formerly brought against others for the same felony. 4 Co. 47. b.* (G. 10.)

Former appeal against others for the same felony.

So the defendant may plead, *auterfoits acquit for the same offence upon an appeal, and vouch the record; for he shall not put his life in jeopardy another time. St. P. C. 105.*

(G. 11.)

But, *auterfoits acquit upon an indictment, is no plea.*

Auterfoits acquit upon appeal.

So, *auterfoits acquit*, pleaded to an indictment is not good, where the acquittal was for default of form, variance, &c. *R. Mod. Ca. 168.*

So, *a release of the action of appeal.*

But, *a release of actions real and personal, is no plea. 2 Rol. 461.*

(G. 12.)
Release of the action of appeal.

* But a release of all manner of actions is a good plea; so of all actions criminal or mortal, or concerning pleas of the crown.

*3 Inst. 287. b. 288. a. **

So, if after an appeal against a man acquitted upon an indictment, a release be given to him, he cannot be discharged without pleading the release; or if the plaintiff be nonsuited upon the appeal. *R. Mod. Ca. 219.*

The defendant in an appeal ought to plead in person, and not by attorney. *D. 3 Mod. 268. Vide Attorney, (B. 6.)*

A plea in an appeal cannot be amended, though before issue, or demurrer. *4 Mod. 158.*

If the plaintiff reply to the plea on an appeal, where the defendant pleads a matter triable by the common law, and also to the felony, he ought to conclude also to the felony, otherwise it will be a discontinuance. *3 Leo. 268.*

But he need not, where the defendant pleads *ne unques accuſe*, &c. which is not triable by the common law. *R. Leo. 268.*

(G. 13.) Issue.

If the issue be joined in an appeal, and the plaintiff does not pray the inquest, the defendant may by proviso. *St. P. C. 71. a.*

If there are several defendants there may be several, or only one *venire facias*, for doubt of challenge. *R. Cro. Car. 532. Jon. 425.*

The issue may be joined to be tried by the country, or by battle. *Dy. 120. Vide Battle, (A. 1.)*

It shall not be tried by *nisi prius*. *Dy 46. a.*

[If the appeal is in *London*, it must be tried at *nisi prius*; for the citizens are not to be brought out of the city. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.*]

If at the trial the defendant makes default, the inquest shall not be taken by default; but if the defendant appeared upon the *capias*, a *capias de novo* shall be awarded; if upon the exigent, an *exigi facias de novo*. *St. P. C. 70. b.*

Issue shall be joined at the bar in *French*, and immediately thereupon, a *venire facias*. *1 Sid. 325.*

[The *venire* must bear teste the day issue is joined, but it is not a discontinuance if it is not taken out and made returnable, the soonest that may be. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.*]

When the jury appear, the appeal and the several issues shall be read to them. *1 Sid. 325.*

The plaintiff shall give evidence first to the plea in abatement, and afterwards to the felony. *1 Sid. 325.*

And the evidence on both sides shall be upon oath. *1 Sid. 325.*

[The record of the acquittal of the appellee on an indictment, is no evidence on the trial of the appeal. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.*]

(G. 14.) Nonsuit, or Verdict.

If the jury give a verdict for the appellee upon the issue in abatement, they shall not give a verdict upon the felony. *R. 1 Sid. 325.*

But if they find for the plaintiff, then they shall answer as to the felony.

And the jury may find the defendant in an appeal for murder, guilty of manslaughter. *R. 1 Sid. 325. Dy. 261. a. Mo. 407. 2 Rol. 461.*

But the jury are not compellable to find the manslaughter, but may find not guilty. *Cro. El. 276.*

If the plaintiff be nonsuited after appearance, it shall be peremptory. *Co. L. 139. a. R. 1 Sid. 32. 22 Aff. pl. 97.*

Otherwise before appearance in proper person. *Dub. 1 Sid. 32. Cont. Cro. El. 605.*

But after a verdict which finds the defendant guilty of manslaughter only, the plaintiff cannot be nonsuited. *R. Mod. 405.*
And

And, if the plaintiff appears by attorney, when he is not demanded, it is not a discontinuance, but the act of the attorney shall be void, if the defendant will; but if he be demanded at any day, and does not appear in person, he shall be nonsuited. *R. 4 Mod. 100.*

If the plaintiff be not ready at any day when he is demandable, he shall be nonsuited.

If the guardian, or attorney, is not present, when admitted by them.

And though he be sick, the court cannot give a longer day. *Lat. 173.*

If the plaintiff be nonsuited or releases, the king may proceed against the defendant upon the same record. *Mod. Ca. 219. Dy. 120. b.*

So, if the plaintiff die before verdict. *2 Leo. 83.*

Otherwise, if after verdict, and before judgment. *2 Leo. 83.*

So, if the plaintiff be barred upon a demurrer. *Dy. 121.*

[If the appellee is acquitted at *nisi prius* in London, the chief justice will not proceed on *stat. Westminster 2. c. 12.* against the appellant, though in court; but application must be made above, or by writ of conspiracy. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.*] **Vid. 2 Hawk. 285, et infra*, where this subject is handled at full length, and with great perspicuity and accuracy.*

(G. 15.) Judgment.

The judgment in an appeal of murder shall be, *quod suspendatur, &c. Co. Ent. 60. b. 2 Inst. 183. 3 Inst. 212.*

*And the ancient law was, that the wife, and all the blood of the party slain should draw the defendant to execution. *3 Inst. 131.**

But if the defendant be found guilty of manslaughter, and has his clergy; the burning is not part of the judgment, and therefore the king may pardon it. *Hob. 294. Dub. Cro. El. 632, 682.*

So in an appeal of robbery, after clergy allowed, he shall be delivered to the ordinary. *2 R. 3. 22. b.*

(G. 16.) Conviction in an Appeal may be pleaded to an Indictment.

If the defendant be convicted in an appeal for felony, and is afterwards indicted for the same felony, he may plead this conviction in bar of the indictment: as, in an appeal for the death of a man, if he be found guilty of homicide, and has his clergy; if he be afterwards indicted for murder, the former conviction will be a bar. *R. 4 Co. 40. a.*

So, a conviction in an appeal for burglary is a good bar to an indictment for the same felony. *R. 4 Co. 39. b.*

A P P E A L.

Otherwise, if the count in an appeal be discharged for insufficiency. *R. 4 Co. 40. a.*

Appeal from the Admiralty.

Vide Admiralty, (G)

Bill by Way of Appeal.

Vide Chancery, (2 O. 2.)

Appeal from Order of Removal of a Pauper.

Vide Justices of Peace, (B. 74.)

Appeal to Parliament.

Vide Parliament, (L. 7, 9.)

Appeals to the Pope.

Vide Popery, (A. 3.—B. 2.)

Appeal in Ecclesiastical Courts.

Vide Prerogative, (D. 13, &c.)

A P P E A R A N C E.

Vide Pleading, (B. 1, &c.)—Appeal, (G. 5.)—Chancery, (T. 1, 2.)—Return, (E. 6.)

A P P E N D A N T

A N D

A P P U R T E N A N T.

(A) Appendant, and Appurtenant.

A Thing *appendant* is that, which beyond memory has belonged to another thing more worthy, which agrees with it in nature and quality. *Co. L. 121. b.*

A thing

A thing *appurtenant* is that, which commences at this day.
Co. L. 121. b.

As, if a man at this day grant *estovers*, common, &c. for an house, or beasts within the manor of another. *1 Vent. 407.*

If a thing, which may be appendant or appurtenant had always passed with the manor to which, &c. by the words, *cum pertinentiis*, it must be taken to be appendant. *1 Rol. 230. l. 27.*
Vide Grant, (E. 9.)

(B) What Things may be so.

(B. 1.) A Thing Incorporeal to a Corporeal.

AND therefore, a thing incorporeal may be appendant or appurtenant to a thing corporeal; as, an advowson, villain, common, &c. may be appendant to a manor, house, or land. *Co. L. 121. b. 1 Rol. 230. l. 36. 4 Co. 37. a. R. Pl. Com. 170.*

So common of turbary, *estovers*, &c. may be appendant to an house. *Co. L. 121. b.*

So common for beasts *levant and couchant* may be appendant to a cottage; for that has a curtilage. *R. Mod. Ca. 114.*

So, common for beasts *sans nombre*. *Semb. Mod. Ca. 114, 115.*
Vide Common, (B.—C.)

So an advowson may be appendant to a manor, castle, house, or land. *Co. L. 122. a. 1 Rol. 230. l. 10. Vide Advowson, (B.)*

So, a leet to a manor. *1 Rol. 230. l. 37.*

So, a hundred, rent, &c. to a manor. *1 Rol. 230. l. 40.*

So, a forest to a manor, honour, or castle. *Pal. 60.*

So a vicarage may be appendant to a manor, rectory, &c.
1 Rol. 231. l. 5. Vide Esglise, (H. 2.)

(B. 2.) Or, *Vice Versâ*.

So a thing corporeal may be appendant to an incorporeal; as, land to an office. *Co. L. 121. b. 1 Rol. 230. l. 45. Pl. Com. 169. a. 4 Co. 37. a.*

To an office of inheritance only. *Dav. 34. a.*

Or, to an hundred. *R. 1 Rol. 231. l. 15.*

So one thing may be appendant to another, though it be in another county; as, an advowson to a manor, &c. in another county. *1 Rol. 230. l. 52.*

What things pass by a grant *cum pertinentiis*. *Vide in Grant, (E. 9.)*

(B. 3.) To what Thing the Appendancy shall be.

An advowson is appendant to the demesnes of the manor, not to the rent or services. *Co. L. 122. a. 1 Rol. 230. l. 15.*

And, if it be appendant to the manor of *A.* to which the manor of *B.* escheats, it continues appendant only to the manor of *A.* *1 Rol. 230. l. 17. Co. L. 122. a.*

So common of turbary, or estovers, is appendant to an house where they shall be spent, not to land. *Co. L. 121. b.*

So a seat in a church is appendant to an house, not to land. *Co. L. 122. a.*

(C) What Things cannot be so.

BUT a thing appendant, or appurtenant, ought to agree with the thing to which it is appendant or appurtenant in nature and quality; and therefore, a thing corporeal cannot be appendant to a thing corporeal. *Co. L. 121. b. 1 Rol. 230. l. 34. 4 Co. 36. b.*

As, land cannot be appendant to other land. *1 Rol. 230. l. 50.*

Nor, to a meadow, or messuage. *Pl. Com. 170. b.*

So a meadow cannot be appurtenant to a pasture, nor a pasture to a wood. *Pl. Com. 170. b.*

And prescription does not make a thing appendant, which does not agree in quality with the other. *Rol. 4 Co. 36. b.*

Nor, generally, a thing incorporeal to another incorporeal. *1 Rol. 230. l. 30. 4 Co. 36. b.*

As, one advowson to another advowson. *1 Rol. 231. l. 12.*

A warren to a leet. *Pl. Com. 168. b.*

A leet to a hundred. *Pl. Com. 168. b.*

One office to another. *Pl. Com. 168. b.*

Nor, an advowson to the rent or services of a manor. *Sav. 105.*

So a thing spiritual cannot be appendant to a thing temporal: as, tithes to a manor. *R. 2 Co. 45. b.*

Nor, a thing temporal to a thing spiritual, or ecclesiastical: as, a leet to a church, or chapel. *Co. L. 121. b. 4 Co. 37. a.*

So, a thing incorporeal cannot be appendant to a corporeal, which does not agree with it in nature: as, common of turbary cannot be appendant to land, but to an house where the turfs are to be spent. *4 Co. 37. a.*

Yet things, which cannot be directly appendant or appurtenant to another thing, may be claimed mediately; as, if a man prescribe, that all those whose estate he has in such a manor, have paid so much to the parson for tithes, and for this reason took the tithes within the manor, it is good. *R. 2 Co. 45. a.*

That all those, whose estate he has in the hundred, &c. have had a leet. *Co. L. 121. a.*

That all in such an office have constituted such an officer. *1 Rol. 230. l. 47.*

(D) Appendancy, how destroyed.

IF a thing appendant or appurtenant to another be granted by itself, without the thing to which, &c. the appendancy is destroyed, and that which was appendant becomes in gross. *Vide Copyhold, (Q. 4.)*

So, if the thing to which, &c. be granted, saving the thing appendant or appurtenant.

As, if an advowson appendant be granted, without the manor to which, &c. or the manor, saving the advowson. *Vide Advowson, (B.)*

So, though there be a grant by a husband seised in right of his wife; this makes a severance so long as the grant stands in force.

So, if the grant be for life, this makes a severance during the life. *1 Rol. 233. l. 10.*

So, if a man present to an advowson appendant, as to an advowson in gross; this makes it disappendant. *1 Rol. 232. l. 48.*

So, if a manor, &c. to which waif, estray, or other franchises are appendant come to the king by purchase, or escheat, they are reunited to the crown; and if the manor be afterwards granted, without express words, or *adeo plene, &c.* they do not continue appendant. *Co. L. 121. b.*

If a thing appendant be ever severed, it shall never afterwards be appendant: as, if the king grant a manor, except the advowson, to *B.* who regrants the manor with the advowson to the king, and the king afterwards grants the manor and advowson to *C.* the advowson continues in gross. *2 Mod. 2.*

APPOINTMENT.

Vide Chancery, (2 F. 1, &c.)—Uses, (N. 11, &c.)

APPORTIONMENT.

Vide Chancery, (2 E.—4 N. 5.)—Suspension, (E.—G.)

APPRENTICE.

Vide Justices of Peace, (B. 53, &c.)—Ley, (D. 1.)—London, (N. 2.)—Trade, (D. 5, &c.)

APPROPRIATION.

Vide Advowson, (D. 1, &c.)

APPROVER.

Vide Justices, (V. &c.)—Officer, (G. 6.)

ARBITRAMENT.

(A.) Arbitrament, what.

AN arbitrament is the judgment, or decree of persons elected by the parties, to arbitrate of the things submitted to them.

And five things must concur to it. 1. Matter in controversy. 2. A submission. 3. Parties to the submission. 4. Arbitrators. 5. Giving up the award. *Dy. 217. a. Hard. 44.*

(B.) Who may be an Arbitrator.

AN arbitrator being a judge elected by the party, every one, capable of making an arbitrament, may be an arbitrator.

(C.) Who not.

BUT a person of *non sane* memory cannot be an arbitrator. Nor, a person, who by nature, or accident, has not discretion. *West. Symb. 163. b.*

Or, an infant. *Ibid.*

Nor, a person, who is not *sui juris*: as, a villein. *Ibid.*

Feme covert. Ibid.

Nor, a person dead in law: as, a monk, or other man professed. *Ibid.*

A man attainted of treason, or felony. *Ibid.*

So, an arbitrator ought to be indifferent; and therefore, an award, made by corruption, or undue means, shall be avoided in equity. *Vide Chancery, (2 K. 2. &c.)*

So the party himself cannot be an arbitrator in his own cause. *Hard. 44. R. cont. 4 Mod. 226.*

And, by the *st. 9 & 10 W. 3. 15.* any arbitration or umpirage procured by corruption, or undue means, (though the reference was by rule of court,) shall be void and set aside by any court of law or equity, so as complaint of such corruption or practice be made in the court where the rule for submission is made, before the last day of the next term after such arbitration or umpirage.

(D.) Submission.

(D. 1.) How it may be made.

THE submission to an arbitrament may be by an indenture with covenants to stand to the award of such persons. *2 Mod. 73.*

Or, by an obligation, with a condition to the same effect.

Or, by several obligations; for if *A.* give an obligation to *B.* and *C.* another, the submission appears upon all. *Cro. Car.* 433.

So, there may be a submission by *parol*; and an *assumpsit* lies for non-performance of the award. *Vide in Action upon the Case upon Assumpsit, (A. 1.) Vide post, (I. 1, 3.)*

So, there may be a submission by several, though one or two only are bound to stand to the award; and the others, who are not bound, may have an action for the non-performance of the award. *1 Rol.* 249. *l.* 35.

So, if a bond of submission be made to *A.* and *B.* and it appears that *A.* was a trustee for *B.* and the condition mentions the arbitrators to be elected only on the part of *A.* yet here is a submission by *B.* also. *R. Lut.* 576.

So, there may be a submission to stand to the award of four, so that an award be made by all, or three of them; and an award by three will be good. *R. Mo.* 849. *R. 2 Cro.* 278.

So a submission may be by rule of court.

Or, by consent at the assizes, afterwards made a rule of court. *Ray.* 35. *1 Sid.* 54.

And, by the *st.* 9 & 10 *W.* 3. 15. all persons desiring to end suits, &c. (for which there is remedy only by personal action or in equity) may agree, that their submission to the award or umpirage of any persons be made a rule of any of the king's courts of record: and may insert such agreement in the condition of the bond, &c. whereby they submit; and on affidavit thereof by one of the witnesses thereto, a rule of court shall be made, that the parties stand to the award of the said arbitrators. And if the party disobey the award, on motion the court shall issue process of contempt, which shall not be stopt by any other court of law or equity, unless on oath it appear the arbitrators misbehaved themselves.

The submission ought to be made a rule of court.

* This statute, which limits the time of complaining against awards to the last day of next term, does not extend to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation; and nothing is a ground within that statute to set aside an award but corruption in the arbitrators. *Str.* 301.*

* A motion, that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term, after such award made according to this statute, although the arbitrator be not charged with corruption or undue means. *2 Term Rep.* 781.*

The court will compel a witness to a submission to arbitration, to make affidavit of the execution, in order to make a rule of court. *Clark v. Elwick, Str.* 1. *Barnes* 58.]

[A submission may be made a rule of court, on motion of one party, and producing the bond executed by the other. *Barnes* 55.]

[It may be made a rule of court, though no part of the condition, only a memorandum signed before execution of bond. *Ibid.*]

And

And if the submission be by rule of court, the court will oblige performance, without making the award also a rule of court. *Per Holt*, 1 *Sal.* 71. * *Semb. cont. B. R. H.* 232.*

[A consent in the submission bond to make the award a rule of court, will not warrant the court's interposing; the submission must be made a rule of court. *Harrison v. Grundy*, H. 16 G. 2. *Str.* 1178.]

[To bring a submission within *stat.* 9 & 10 W. 3. c. 15. it must be confirmed by rule of court prior to making the award. *Spetigue v. Carpenter*, T. 1735. 3 P. W. 361.]

If a bond says, *and if he consent to have the submission a rule of court*, it is a sufficient consent. 1 *Sal.* 72.

If the party does not obey an award by a rule of court, an attachment shall be granted against him, if he does not shew cause to the contrary upon notice, upon which he shall be imprisoned for his contempt. *St.* 9 & 10 W. 3. 15. *Dub. Ray.* 35. 1 *Sid.* 452. R. 1 *Sal.* 83.

[A parol award may be enforced by attachment. *Barnes* 54.]

[The court will not ground an attachment for non-performance of an award on the affirmation of a Quaker, for it is a criminal prosecution within 7 & 8 W. 3. c. 34. *Robins v. Sayward*, T. 7 G. *Str.* 441.]

And he must obey it, though it be defective in other respects; unless it be made by practice, or corruption, or be irregular. 1 *Sal.* 71, 73, 83.

[If the submission is by obligation, the award must be complained against, before the end of the next term, but not such awards as are made in pursuance of a rule of *nisi prius*. *Anderson v. Coxeter*, P. 6 G. *Str.* 301.]

Nothing but manifest corruption in the arbitrators, is good ground within *stat.* 9 & 10 W. 3. for B. R. to set aside an award. *Ibid.*

[Objection to an award in point of law, cannot be made after first term, and attachment goes. *Barnes* 55.]

[After second term, if for corruption or ill practice; but if the objection arises on the face of award, at any time. *Barnes* 56.]

[An award cannot be set aside but for fraud or corruption in the arbitrators, not for not being final or mutual, or other defects appearing on the face of it; but in such case, the court will not grant attachment for not performing it. *Hutchins v. Hutchins*, M. 12 G. 2. *Andr.* 297.]

And it shall be construed according to the intent, though the expression is not so exact. 1 *Sid.* 54.

If he does not obey an award, where a verdict is given for security, the plaintiff may take judgment, or have an attachment. 1 *Sal.* 84.

If a stranger defeats an award made by rule of court, an attachment lies against him. *Sal.* 596.

So, if the party has not satisfaction, though he proceeds by way of contempt, he may also proceed upon the bond. 1 *Sal.* 73.

Yet an award upon a submission made a rule of court pursuant to the *st.* 9 & 10 W. 3. 15. may be avoided for other defects,

fects, as well as corruption; otherwise judgment will be one way when given upon a bond, and another way when given upon a rule of court. *R. in B. R. Pasc. 6 Ann.*

[If the arbitrators take money of one party alone for their charges, without any bill delivered, before making their award, it shall be set aside. *Shephard v. Brand, T. 7 G. 2. B. R. H. 53.*]

If there be a submission generally at the assizes, upon the trial of a particular action, yet the arbitrators may determine all other matters between the parties. *Per C. B. Pas. 6 Ann.*

If a reference be agreed, a stay of proceedings shall be consequent. *Per Twifden, 1 Mod. 24.*

And, if there be an action upon a bond, for non-performance; it will be a good breach, *that he proceeded to execution. R. 2 Jon. 134.*

So, if one serve a *subpoena* upon the other after a submission by rule, it will be a breach. *1 Sal. 73.*

But, non-performance during contest is no contempt. *1 Sal. 73.*

So, if any part of the award be impossible, for the non-performance of so much no attachment goes. *1 Sal. 83.*

When an award shall be confirmed, or avoided in equity, *Vide in Chancery, (2 K. 1, &c.)*

(D. 2.) By whom it may be made.

Every one capable of making a disposition, or a release of his right, may make a submission to an award.

But an infant cannot submit to arbitrament; for his submission is void. *1 Rol. 268. l. 5.*

Yet if an infant and a man of full age join in a submission, it is good; for though the infant cannot be obliged to stand to it, yet his submission is only voidable, and he may agree or disagree, to the award at his full age. *R. Lat. 207. 1 Jon. 165. Dub. 3 Lev. 17. Semb. 1 Rol. 730. l. 7.*

And a father may be obliged, *that he and his son an infant shall stand to an award*; and such obligation binds the father. *Semb. Lat. 207.*

And therefore, if the father pleads to the obligation, *that his son was within age*, it is no bar. *R. 3 Lev. 17.*

So a father may submit *for him and his son*, and it is good for the son. *Semb. 1 Lev. 139.*

So a *feme covert* cannot submit herself to an award.

But the husband may submit, *for him and his wife. Sti. 351.*

So, if the husband only submit, it is sufficient for a debt due from the wife as executrix or administratrix; for the husband is chargeable with it by the intermarriage. *R. 1 Rol. 246. l. 5, 10.*

So, if there be a submission by the husband only for a lease for years, which his wife has as executrix; and this binds the wife after his death. *1 Rol. 245. l. 50.*

Or,

Or, for a debt upon a bond made to his wife before coverture. *Mar.* 77.

So, if there be a controversy between *A.* of the one part, and *B.* and *C.* of the other; and *B.* submit for himself and *C.* and there be an award, *that B. shall pay, &c.* this is good, though *C.* be a stranger. *R.* 1 *Rol.* 244. l. 20.

So, if *B.* submit for himself and his partner; and the award is, *that B. pay.* *R.* 2 *Mod.* 228.

So, if *B.* submit, as the attorney of *C. B.* shall be bound. *R.* 1 *Sal.* 70. *Skin.* 679.

(D. 3.) What Things may be submitted.

All personal actions and things of an uncertain nature may be determined by arbitrament.

So a debt on a specialty or record, though certain, may be submitted *amongst other things.* 1 *Lev.* 292.

But freehold, or inheritance of lands, cannot be determined by arbitrament. 1 *Rol.* 242. l. 10.

And therefore, there cannot be a partition by an award; for freehold does not pass without livery. *R.* 1 *Rol.* 242. l. 16.

So the interest of an estate for years cannot be transferred by an award; for it is a chattel real. 1 *Rol.* 242. l. 20. *Symb. cont. Dy.* 183. a. in marg. 2 *Lev.* 104. *Cro. El.* 223.

Nor, a thing certain; as, a debt upon bond, by itself. 1 *Lev.* 292.

Or, a debt upon record; as, arrears of an account found before auditors.

But an award may be made of the arrearages of a rent reserved upon a lease for years. 1 *Rol.* 242. l. 25.

So, if a man be bound to stand to an award, and the arbitrators make an award, *that land shall be conveyed;* if the party refuses the conveyance, he forfeits his obligation. 1 *Rol.* 244. l. 5.

So, if an award be, *that one shall pay so much in satisfaction of a specialty,* though the specialty is not thereby discharged, yet if he commence an action upon the specialty afterwards, he forfeits his obligation. *R.* 1 *Rol.* 243. l. 15. 2 *Cro.* 447.

(D. 4.) To what Things a Submission extends.

If there be a submission of all actions and complaints; causes of action are submitted. 1 *Rol.* 245. l. 20.

If, of actions personal, *ac seclis et querelis;* actions real are submitted. 1 *Rol.* 246. 30. (a)

If there be a submission of all matters between them two; an action by one of them, and his wife against the other, is not submitted. *R.* 1 *Rol.* 246. l. 15.

(a) Note; The difference between these cases is in the word *ac*, which in the first prevents the word personal from applying to the following words.

If, of all demands; title to land is submitted. *Semb. Kel. 99. b.*
 If, of all debts; specialties and judgments for them may be released. *R. 2 Sard. 190.*

If, of all differences; all demands may be released.

But by a submission of all actions, causes of action are not submitted. *1 Rol. 245. l. 20.*

By a submission of actions personal, suits and complaints, actions real are not submitted; for personal refers to the whole. *1 Rol. 246. l. 25. (a)*

By a submission by *A.* and *B.* of the one part, and *C.* of the other, of all matters between them, an action by *A.* alone against *C.* is submitted; for it shall be taken distributively. *R. 1 Rol. 246. l. 20. Semb. Lut. 1628.*

By a submission of *A.* of all matters, a debt, due from the wife of *A.* as executrix, is submitted. *R. 2 Cro. 447.*

[If all matters in difference are submitted, it extends to a demand as executor. *Elleson v. Commins, M. 14 G. 2. Sir. 1144.*]

By a submission to *A.* who orders a lease, it does not extend to payment of rent upon the lease. *Mo. 3.*

[On a rule of reference to three jurymen, they may award a sum certain for costs, and the court cannot take notice of it, unless they are excessive, * and then only as an evidence of some undue practice. *B. R. H. 53.*] *

(D. 5.) When a Submission may be revoked.

If there be a submission to an award, it may be revoked before the award made. *Semb. 1 Sid. 281.*

If two submit on one part, and one on the other; one of those two may revoke without the other. *1 Rol. 331. l. 16.*

If there be a submission by a *feme sole*, who marries before an award made, it will be a revocation.

So, if the woman and *B.* submit on one part, and the woman marries; it will be a revocation as to *B.* also. *R. 1 Rol. 331. l. 45. Jon. 388.*

But, if there be a submission, and a bond is given to stand to an award; if the obligor revoke, he forfeits his bond. *1 Rol. 331. l. 15. 8 Co. 82. a.*

So, if a submission be revoked; it is of no avail till notice of the revocation to the arbitrators. *R. 1 Rol. 331. l. 40.*

Yet, if the revocation is by marriage, they ought to take notice. *R. 1 Rol. 331. l. 48.*

If the arbitrators are made commissioners by order of the chancery to determine the difference, it is no revocation of the submission of the parties. *1 Rol. 331. l. 35.*

(E) Award.

(E) Award.

(E. 1.) What shall be a good one.

(E. 1.) [A]WARDS should be construed liberally and favourably. *Hawkins v. Colclough*, P. 30 G. 2. 1 B. M. 274.]
 It must be pursuant to the submission. And therefore shall be void as to a stranger, *Vide post*, (E. 7.)
 An award ought to be pursuant to the submission: and therefore, if it be made of a thing merely out of the submission, it is void. 1 Rol. 242. l. 35.
 As, if it be awarded, that a stranger shall do such an act; it is void for so much: as, *that a stranger shall give a bond*. R. 1 Rol. 243. l. 5. 247. l. 10. 10 Co. 131. b.

That the party, his wife, and son, shall join in a conveyance, is void as to the wife and son. R. 1 Rol. 248. l. 10. 259. l. 30.

That the lord of a manor grant a copyhold. R. Mo. 3.

That the servant of A. who submitted, pay to the servant of B. R. 3 Leo. 62.

So, an award of a thing to be done to a stranger is void: as, *to pay money to a stranger*. 1 Rol. 243. l. 10. 247. l. 25. 10 Co. 131. b. for it does not appear to be any advantage to the party. 1 Rol. 247. l. 30. *Vide post*, (E. 7.)

To assure lands to the party and his wife, who is a stranger to the submission, is void as to the wife. R. 2 Rol. 243. l. 12. *Semb. Mo. 359.*

To be bound with sureties, is void as to the sureties. 1 Rol. 248. l. 47. R. 3 Leo. 62.

To be in such a place with his counsel to hear the award. 1 Rol. 244. l. 40.

So, an award, *to pay upon the land, or, within the house of a stranger*; for this obliges him to be a trespasser. R. 1 Rol. 247. l. 20.

Otherwise, if it be, *at the house*; for that does not make him a trespasser. R. 1 Rol. 247. l. 15. 249. l. 25. R. 3 Leo. 153.

[If A. acting as attorney for and on behalf of B. gives bond to submit to award to be made, touching all matters between C. and B. and on an action brought, defendant craves oyer, and pleads, *no award*, and plaintiff replies, and sets forth an award made concerning the premises in the bond specified; and the award is made, that A. should pay C. so much, and C. accept it in full of all demands, and that each of the parties should execute a release; though it does not expressly mention that it is in relation to the things submitted, yet as that appears on the record by the replication, it is a good award: for it is within the submission final and mutual. *Cayhill v. Fitzgerald*, M. & P. 17 G. 2. *Wilf. 28. 58.*]

[If pending a suit for an assault there is a general submission, and the award recites the suit, and determines each to pay his own costs, and defendant to pay plaintiff 5s. and there does not appear

appear to have been any other matter between them; the award is good. *Hawkins v. Colclough*, P. 30 G. 2. 1 B. M. 274.]

[Submission to award indented; award good, though not indented. *Barnes* 55.]

[Award is good though the time of execution doth not appear. *Barnes* 56.]

[Submission to three, so as they, or any two of them, &c. award made by two, the third having had notice, is good. *Barnes* 57.]

So, an award of a thing after the time of the submission is void: as, if it be of rent which shall be due at Michaelmas next. *R. 1 Rol. 243. l. 40. 245. l. 45.* (E. 2.) When it goes to a time beyond the submission.

If it awards a release of all actions 'till the day of the award made; for this extends to actions beyond the time of the submission. *R. fape, 1 Rol. 242. l. 45. 245. l. 25. Semb. cont. 1 Rol. 254. l. 15. Acc. 1 Rol. 258. l. 5. 260. l. 15, 25. 3 Lev. 188. R. 2 Cro. 352. R. 1 Sal. 74.*

But it ought to be averred, that there are matters arising between the submission and the time of the award; otherwise it will be good; for it shall not be intended. *R. 1 Rol. 244. l. 50. Vide post, (E. 10.)*

So an award, that one shall pay for writing the award, is void for so much; for this goes to a thing happening after the submission. *R. 1 Rol. 254. l. 30. 2 Cro. 578.*

* But now it is decided that the power of awarding costs is necessarily consequent to the authority conferred on the arbitrators of determining the cause; and when a provision is inserted that the costs shall abide the event, it is a restriction of the general power. *2 Term Rep. 645. **

Or, that the parties shall pay the reckoning at the meeting of the arbitrators. *1 Rol. 254. l. 35.*

[If an award directs mutual releases to the time of the award, it is good; but tender of release to the time of the submission is sufficient. *Keen v. Goodwin*, P. 1728. *Bunb. 250.*]

So, an award of a thing not submitted: as, if the submission be, of all matters depending, and the award be, of all matters, generally. *1 Rol. 243. l. 25.* (E. 3.) Or, to matters not submitted.

If the submission be, of all matters except an obligation; and the award be, of all demands. *R. 1 Rol. 261. l. 2.*

Or, if the submission be, of all monies expended for the wife at her request; and the award be, of all monies expended for the wife. *R. 2 Cro. 639.*

* But if on a reference of all matters in difference between two partners, the award be that the partnership be dissolved, that is within the submission, and therefore good. *1 Bl. Rep. 475. **

* So, if the reference be of all matters in difference in this cause, and general releases be awarded, it is good as to matters referred, though void as to the residue. *2 Bl. Rep. 1117. **

* A sub-

* A submission of all matters in difference "in this cause between the parties," is only a reference of the cause in question, but a submission of all matters in difference "between the parties in this cause" is a general submission. 2 Term Rep. 647.*

(E. 4.)
Or, does not extend to all the matters submitted. Where the submission is conditional with an *ita quod*, &c.
Vide post,
(E. 5.)

So, if a submission be, *ita quod fiat de pramissis*, the award shall be of all matters in controversy, of which they have knowledge; otherwise it will be void. R. 1 Rol. 256. l. 27. R. 8 Co. 93. a.

So, if a submission be, *of all matters ita quod, the same award be made such a day*, omitting, *that it be made, de pramissis*; for the words, *the same award*, &c. are tantamount. R. Cro. El. 838. Lut. 533.

If there be a submission to the award of *A. and B. ita quod*, &c. and if they do not, to an umpire; the clause, *ita quod*, extends to the umpirage. R. 1 Lev. 140.

And therefore, if there be a submission of *such and such things* specially named *ita quod*, &c. an award not made of all is void; for they ought to take notice of them, being specially named in the submission, without other information. R. 1 Rol. 256. l. 35.

If a submission be *ita quod*, &c. the award is sufficient, if it be of all matters notified to the arbitrators, though there be other matters not notified. R. 2 Cro. 200.

And, it is not sufficient in pleading to say, *that it was made de pramissis*, if the award does not import it. 1 Sal. 70.

(E. 5.)
Or, to all the persons.

So, if there be a submission of all controversies *between A. and B. of the one part, and C. of the other ita quod*, &c. an award of all between *A. and C.* omitting *B.* is void. R. 1 Rol. 261. l. 15.

So, if *A.* submits for himself and his son all, &c. *ita quod* &c. an award between *A.* and the other, if nothing be done *quoad* the son, is void for the whole. R. 1 Lev. 139, 140.

But, if the submission be general without an *ita quod*, &c. the award may be of part of the matters in difference. 1 Rol. 256. l. 5, 10. R. Cro. El. 838. R. 8 Co. 98. a.

Though three things in particular are submitted. 1 Rol. 256. l. 15. 8 Co. 98. a.

Though all actions real and personal are submitted, and nothing awarded as to the real. 1 Rol. 256. l. 20.

So, if the submission be, *ita quod it be signed, sealed and delivered by the arbitrators as their deed*; it is not good, if it be sealed and delivered as their deed, but not signed. R. 1 Rol. 245. l. 10. *Vide post*, (l. 6.)

Ita quod it be made and ready to be delivered; it ought to be in writing, otherwise it is not ready for delivery. Cont. Dy. 218. b. Co. Ent. 126. pl. 10. R. acc. 1 Ann. in C. B. Mod. Ca. 176. R. cont. 3 Ann. in B. R. Mod. Ca. 160, 176. Sal. 75. *Vide post*, (l. 6.) * (E. 20.) *

But,

But, if a thing awarded to be done be out of the submission, (E. 6.) it is not material, if the matters for which the award is made are within it; as if the award be, *that the parties sign and seal the award.* 1 Rol. 245. l. 30.

That one of them shall give an obligation, horse, &c. to the other in satisfaction of all matters submitted. 1 Rol. 245. l. 35. 243. l. 40, 45.

That he shall give or redeliver an obligation, made after the submission and before the award, in satisfaction of all differences between them. R. 1 Rol. 243. l. 40.

But it is sufficient, that the things determined by the award are within the submission, though a thing to be done be out of it.

So an award of a thing to be done to a stranger is good, where the stranger is only an instrument: as, *to pay money to a stranger for the use or benefit of the parties.* Semb. 1 Rol. 247. l. 30, 35. 249. l. 15. 30.

To surrender a copyhold into the hands of two tenants, though they are strangers. R. Rol. 247. l. 40.

To pay in vel ad domum A. who is a stranger. R. 3 Lev. 153. R. Cro. Car. 226. 1 Rol. 6.

That he shall make a feoffment with a letter of attorney to B. to make livery; for B. is but an instrument. 1 Rol. 247. l. 45.

That one shall acquit the other of an obligation, in which both are bound to B. R. 1 Rol. 248. l. 15. 1 Mod. 9. Jon. 431.

That he shall levy a fine; though that is the act of the court. 1 Rol. 248. l. 50.

That he shall enfeoff a stranger. 1 Rol. 249. l. 20.

That cestuy que use shall cause his feoffees to make a release to one in possession. Lut. 576.

So, *that he pay money to a stranger*, where it appears to be for the benefit of the parties. 1 Sal. 74.

So, if the contrary does not appear, it shall be intended for their benefit. Semb. 1 Sal. 74.

So, where there is a submission by several persons jointly, though they are severally bound, an award as to all is good; and in a declaration against one of them upon his bond, if it be, *that neither he nor the others paid*, it is well; for upon the whole declaration, and matter disclosed, it appears that they are not strangers. 1 Rol. 248. l. 5.

So, if a submission be by several who are severally bound, an award, *that A. and B. pay*, is good; for upon the whole of the case it appears, that B. though not named in the bond given by A. is not a stranger. R. Cro. Car. 433.

So, where there is a submission by a trustee, with the assent of the *cestuy que trust*; an award of payment to the *cestuy que trust*, is good. R. Lut. 577.

So, where there is a submission by an husband, for a debt due to his wife before coverture; an award of payment to the husband and wife is good. Mar. 78. Lut. 576.

So, where a payment to a stranger appears to be for the advantage of the party, it shall be good: as, if an award be, *that he pay to A. to whom his surety was bound for him.* R. 1 Rol. 247. l. 35.

That

That he pay to the servant of B. who submitted. L. 3 Lev. 62. Dy. 242. B. in marg.

But an award does not bind a stranger to do any act, as a release, confirmation, &c. *Mo. 3.*

(E. 8.)
And the
award is
void only
for so much
as is out of
the submis-
sion.
Vide post,
(E. 19.)

So if an award exceeds and goes to matters out of the submission, it is good for so much as is within the submission: As if an award be, *that A. and a stranger pay, &c.* it is good against A. and he is bound to pay, though it be void as to the stranger. *R. 1 Rol. 244. l. 25.*

So if a submission be, *for himself and B.* and there be an award, *that the obligor pay so much for himself and B.* it is good. *R. 1 Rol. 244. l. 20.*

If there be a submission of suits for tithes; an award, *that one shall discontinue all suits*, when there are suits for other things depending, though it be void for those, is good, and he ought to discontinue the suits for tithes. *R. 1 Rol. 258. l. 40. 2 Cro. 664.*

If there be an award, *that an husband and his wife make an assurance*; it is good for the husband. *R. 1 Rol. 259. l. 20.*

That A. be bound with sureties, &c. shall be good as to A. *R. 2 Lev. 6. R. Sho. 82. Carth. 159.*

That A. shall make a release to a day after the submission, shall be void for the time after. *R. Win. 1.*

(E. 9.)
And there
shall not be
any forced
construction
to make
it to be cut
of the sub-
mission.

And there shall not be a strained construction to make it to be out of the submission: And therefore, if there be a submission of *all actions personal ita quod, &c.* and the award be *de et super premissis, that one shall pay so much at a future day, and then shall make a release of all actions personal*; the release shall be only of actions 'till the submission. *1 Rol. 256. l. 45. R. 2 Mod. 170.*

If a submission be of *all matters*, and an award, *that he shall pay so much, and if there be proof that he receives more, then he shall pay that also*; by which there appears a doubt of a thing which was not determined; yet it shall not be intended, that such doubt was among the parties before the submission, but only among the arbitrators. *R. 1 Rol. 257. l. 45.*

If a release be awarded of *all demands*, generally; it shall not be construed of demands after the submission. *R. Hut. 29. R. 3 Lev. 188, 344. Sho. 272.*

If an award *de et super premissis* be of *10l. in satisfaction of a debt then due*; it shall not be intended due at the time of the award, and not at the time of the submission. *R. 2 Cro. 285. R. Cro. El. 861.*

So an award *de premissis, to pay 10l. at Michaelmas next, and then to release all matters*; the release shall be restrained to the matters submitted, and others shall not be intended unless they are shewn. *R. Hob. 190, 191. Mo. 885.*

So an award *to release an action then depending*, shall be intended depending at the time of the submission. *Dub. Cro. El. 13.*

So an award of *general releases*, extends only to matters at the time of the submission. *R. 3 Mod. 264.*

So a submission of *all matters, ita quod, &c.* an award of *all matters, except an obligation which shall stand in force*, is good; for the award extends to this obligation, *viz. that it shall not be discharged.* *R. 1 Rol. 257. l. 2.*

A submission of *wood, underwood, &c. ita quod, &c.* An award *de præmissis* that one shall have the underwood and shall release all demands, is good; for this determines the dispute as to the wood. *R. 1 Rol. 257. l. 5.*

And if it does not appear not to be pursuant to the submission, (E. 10.) it shall not be intended: And therefore, if an award *de præmissis* be of *all matters till the time of the award*, it is good, unless it be averred, that matters arose between them after the submission, before the time of the award. *R. 1 Rol. 244. l. 50. 258. l. 20. 260. l. 10, 20.* Nor shall it be intended to be out of it, if it does not appear so.

So if an award be, *that one shall release all actions at the time of the release*; unless it appears, that there were actions after the submission before the release. *R. 1 Rol. 257. l. 15. 260. l. 35, 45. R. Hut. 29. Semb. 3 Lev. 188. R.* that it ought to be averred by the plaintiff, that there were no more causes of action. *2 Cro. 353.*

So if a submission be, *ita quod fiat de præmissis*; and a release be awarded of all actions, but it is void for such part, yet it may be good for the residue; and there shall not be intended other actions which are not discharged, unless it be averred that there are. *R. 1 Rol. 244. l. 40.*

So if an award recites, *that controversies were depending 29 January*, and it is made *de & supra præmissis of all matters till 28 January*, it is good; for it shall not be intended, unless it be averred, that any matter was depending 29 January, which was not the 28 January. *R. 1 Rol. 245. l. 5. Cro. Car. 216. R. 1 Rol. 257. l. 25. 2 Cro. 578. R. Cro. El. 858.*

So in all cases, if the submission be, *of all controversies, generally, ita quod, &c.* an award of all controversies, of which they had knowledge, is good, unless it be averred, that there were other matters of which they had information. *R. 1 Rol. 256. 30.*

So an award, *that all actions cease*, when the submission was, of *all actions for tithes*; for they shall not be intended other actions. *R. 2 Cro. 664.*

If a submission of *all matters, ita quod fiat de præmissis*; an award *de præmissis* of a single matter, is good; for others shall not be intended, unless they are shewn. *R. 8 Co. 98. a. 2 Cro. 285.*

If an award be, *that he release all debts by judgment, extent, &c.* which are not submitted; it shall not be intended, that there are any such, unless they are shewn. *R. 2 Sand. 190.*

So an award ought to be certain: and therefore, an award, (E. 11.) *per super prædicto primo die Maij*, where no such day is mentioned must be certain. *Vol. I. N n*

mentioned before, is void. *R. 1 Rol. 254. l. 40. 263. l. 35.*

To pay a moiety of a debt for which A. was bound, without saying, in what sum. R. 1 Rol. 263. l. 10.

Though it be said in the declaration, in what sum. *1 Rol. 263. l. 15.*

So an award, that one shall make an obligation for enjoyment of lands, without saying, in what sum, will be void for the uncertainty. *R. 1 Rol. 263. l. 20. 5 Co. 77. Mo. 359. R. 2 Cro. 314.*

[An award that the defendant should give security to pay plaintiff an annuity, and all proceedings depending at law should be no farther prosecuted, is ill, being not certain, nor final, nor mutual. *Tipping v. Smith, M. 9 G. 2. Str. 1024.*]

So upon a submission of a title to land vocat' K. an award, that one shall have so many acres in K. without giving any name to the land, is void, though it be averred, that that is the land vocat' K. *1 Rol. 263. l. 30.*

To pay so much for every quartern of malt, as malt may be sold for, without saying, in what place the sale shall be. R. 1 Rol. 263. l. 45.

To pay the arrears of a rent incurred after a purchase, without saying, when the purchase was, or when it was in arrear. R. 1 Rol. 264. l. 5. Sti. 365.

To pay the costs of a suit now depending. Semb. 1 Sal. 75. Mod. Ca. 195.

Costs of a suit, and all reasonable expences, which the plaintiff sustained circa festum prædictam. R. 3 Lev. 414.

[“Costs in the peverel court, and in an action at law,” bar for uncertainty. *Barnes 166.*]

But an award, that one shall pay his proportion which shall appear due upon an account, is good; for, *certum est quod certum reddi potest. 1 Rol. 251. l. 40.*

That he pay the charge of a suit, of which the other shall deliver bill. R. 3 Lev. 18.

So, that he pay the charge of such a suit, generally. *R. 2 V. 243. Carth. 157.*

Or that he pay the costs of such a suit to be taxed by the prothonotary. *R. 1 Sid. 358. Adm. 1 Sal. 75. Mod. Ca. 195.*

[If costs are awarded, and these costs are taxed by a prothonotary, it is well. *Barnes 56.*]

[If costs are ordered, but nobody appointed to tax them, the court may order the master to do it. *Dudley v. Nettlefold, 13 G. Str. 737. * 2 Wils. 268.*]*

* But an award to pay costs to be taxed by one not an officer for that purpose, is ill. *Sir. 1025.**

[If an award directs defendant to pay plaintiff's attorney the full fourth parts of the costs to be taxed by the master, they shall be taxed as between party and party. *Pratt v. Salt, M. 9 G. B. R. H. 161.*]

So an award, *to pay 20l. aut eo circiter, in discharge of an obligation of 40l. aut eo circiter.* 1 Rol. 263. l. 50.

So it may be ascertained by an averment; and therefore, an award *to pay a debt for which A. was bound*, without saying in what sum, may be ascertained, by an averment, that he was bound only in such an obligation. *Per Hought.* 1 Rol. 263. l. 17.

To pay all monies expended in such a suit, it may be averred, that he expended so much. *R. acc.* where the award was by *parol*, but *semb. cont.* if it had been in writing. *Carth.* 157.

So an award, *to make a release, pay money, &c.* without saying at what time, is good; for if a request is necessary, it must be in a convenient time after the request; if there needs no request, it must be done in a convenient time. 1 Sal. 69.

An award without a date, *to do a thing within seven days after the date*, is good; for the date shall be computed from the delivery. *R.* 1 Sal. 76.

So an award, *that an erection upon the defendant's soil shall be pulled down*, without saying, by whom; for the defendant, who is owner of the soil, shall pull it down. *R. per three Judges.* *Holt cont.* 1 Sal. 76.

So an award ought to be possible: and therefore, if it be impossible, it shall be void: as, an award to pay at a day past. Possible. (E. 12.)
1 Rol. 244. l. 14. 248. E.

But if it afterwards becomes impossible by the act of the party himself, or of a stranger, he shall be bound to perform it. *Semb.* 2 Mod. 27, 28. *Vide Condition* (D. 1.)

So it ought to be reasonable: and therefore, an award, *that one shall serve the other for two years*, is void. 1 Rol. 243. l. 52. Reasonable. (E. 13.)

Or, *that one shall release his right to the land in satisfaction of a trespass.* 1 Rol. 244. l. 1.

So an award, that he shall cause a stranger to do a thing, which he has no means in law, or equity, or otherwise to compel him to do, is not good. 1 Rol. 248. l. 45.

As, *that he shall command the justices to levy a fine.* 1 Rol. 249. l. 2.

Yet an award, *to make a discontinuance of an action*, is good; though it be the act of the court, yet the default, &c. is the act of the party. 1 Rol. 249. l. 5.

Or, *to be non-suited.* 1 Rol. 249. l. 10.

Or, *to enter a retraxit.* 1 Rol. 249. l. 12.

So an award, to pay a less sum in satisfaction of a greater, is good. *R.* 2 Cro. 447. *R.* 2 Mod. 303.

So an award ought to be mutual: and therefore, if it be of one part only, and nothing of the other, it shall be void. 1 Rol. Mutual. (E. 14.)
33. l. 7.

As, *that one shall be quit of all actions, which the other has against him.* 1 Rol. 253. l. 10. 7 H. 6. 40.

Or, *shall pay 10s. to the other.* 1 Rol. 253. l. 15.

Or, *shall pay 10l. and they shall be friends.* Semb. Mo. 642.

So an award which directs a thing to be done on each part, but is void, as to that which is to be done on one part, is void for the whole. *Vide post*, (E. 18.)

As, an award, *that one shall pay so much to the other, and the other shall pay for the writings of the award*; for this last part is out of the submission. R. 1 Rol. 254. l. 30, 35. R. Al. 10. Dub. 2 Lev. 3.

That A. pay to B. super 21 Maij, & B. release super prædium primum diem Maij; for there was no such day. R. 2 Cro. 149.

So, if *A. submit as attorney of B.* and there be an award between *A. and C. that A. shall pay so much, and that they shall give mutual releases*; it is not good, for *A.* pays as attorney of *B.* and the release to *A.* does not discharge *B.* unless it be given to the use of *B.* 1 Sal. 70. Skin. 679.

But an award, *that one shall pay 10s. to the other in satisfaction of all actions between them*, is good, though nothing be awarded for the other to do; for the actions are thereby discharged.

1 Rol. 253. l. 17. R. Mod. Ca. 35.

Or, *for all matters between them.* R. 1 Rol. 253. l. 32.

Or, *in consideration of such a debt.* R. 8 Co. 98, Bospole. R. 2 Cro. 448. 1 Bul. 145.

So, if there be a submission of *all matters*; and an award made *de & super præmissis in manner following, viz. that one shall pay so much to the other*, it is good; for, being *super præmissis*, must be intended in satisfaction of all matters. R. 1 Rol. 253. l. 25. Cont. 254. l. 5.

So, if it be awarded, *that one shall give 40s. in satisfaction all matters, and the other shall make a release*, and it be void as the release, yet it is good, because the 40s. being in satisfaction all matters are discharged. 1 Rol. 253. l. 50.

So an award, *that all controversies cease, and that one shall give 12d. to the other.* R. 1 Rol. 254. l. 2. R. 2 Mod. 2. R. 1 Lev. 58.

So an award, *super præmissis, that one shall give so much, and parties shall be friends, and shall make releases to the time of award*; though it be void as to the releases. R. 1 Rol. 254. l. 15. 260. l. 10.

So an award, *that one shall pay 10l. and the other upon receipt shall make a release*, is good, though objected, that nothing awarded against the other till after receipt, and he was not bound to receive; for an award to pay so much obliges the other to receive it. R. 1 Rol. 255. l. 5. R. Mod. Ca. 35.

So, an award *super præmissis*, reciting, *pro eo quod one of them had done such and such things*, it was awarded in *ea parte sequitur, viz. that he shall pay 500l. without more*, is good; it cannot be intended for other things than for those recited. Cont. But upon error. Semb. acc. 1 Rol. 255. l. 20.

So, an award, that one pay 10*l.* and the other pay the charge of the award, and upon performance give general releases; though it be void for the charges, and the release is not to be till performance of all; for the award being void for the charges, the release shall be given presently. *R. 2 Lev. 3.*

So, that the defendant be bound with sureties, and upon delivering the bond, the plaintiff do release; for upon a bond by the defendant alone, the plaintiff must release. *R. Carth. 160.*

Yet an award *super premissis*, that one shall pay so much, shall not be intended in satisfaction of the premisses; where the other was awarded expressly to make a release, or such like, but for some defect the award, as to that, is void. *R. 1 Rol. 253. l. 40. 254. l. 40. 259. l. 45. 2 Rol. 1. Poph. 134.*

So an award, that one shall pay for taskwork, (without saying what sum) and that the other shall pay 2*5l.* and both shall give general releases, being uncertain, and therefore void for the taskwork, shall be void for the whole, though there are mutual releases; for the payment for the taskwork, as well as the general release, was intended as a recompence for the 2*5l.* on the other part. *R. 2 Sand. 293. Vide Lut. 57.*

Otherwise, if the part which is void would be no benefit to the party: as, if a payment was awarded to B. and likewise to a stranger, and that B. should release. *Acc. 2 Sand. 293. Lut. 533.*

Or, the whole was not uncertain. *R. 3 Lev. 413.*

So an award ought to be final: and therefore, an award, (E. 15.) to stand to the arbitrament of such an one, is void. *R. 1 Rol. 244. Final. l. 30. 251. l. 20. * For they cannot delegate their authority. B. R. H. 181. **

So an award, to pay so much, or if it be proved by such a day, &c. that then there shall be a further award, is void. *R. 1 Rol. 251. l. 5.*

An award, to pay so much, and if there be proof within a month of more due, to pay that also. *R. 1 Rol. 251. l. 30.*

So, to do that which the arbitrators upon advice at the affixes shall appoint; for they cannot reserve a future authority to themselves. *R. 2 Cro. 315.*

So, to make submission to B. in such manner and place as B. shall say; for B. will determine for himself. *R. 1 Sal. 71.*

So an award, that each shall be nonsuited, or discontinue his action against the other, is not good; for they may sue de novo. *1 Rol. 252. l. 50.*

That one shall give the other a bond for such a sum with such sureties as the other should approve, and that they shall make mutual releases, for if he will not approve of the sureties, nothing is done. *R. 3 Mod. 272.*

But an award, to give a bond for payment, is good. *1 Rol. 249. l. 40.*

Or, to give such a bond as his counsel shall advise. *1 Rol. 250. l. 20, 30.* for the counsel makes no judgment, but is only a minister to direct what is valid in law.

That

That the party shall not prosecute any suit upon a bond. R. 1 Rol. 261. l. 5.

That all suits shall cease. R. 1 Sal. 74. * for that amounts to a release. Barnes 56. *

Or, that a bill in equity shall be dismissed. R. 1 Sal. 75.

So an award, to pay 100l. at such a day, and if he does not pay, 110l. at a subsequent day, is good. R. 1 Rol. 250. l. 35.

*To covenant to indemnify from the costs in a suit by plaintiff, as qui tam, &c. Per 3 Judges, Page cont. F, g. 271. * Acc. Str. 903. **

To pay his proportion upon an account. R. 1 Rol. 251. l. 40.

To pay so much towards his charges for it is tantamount as in satisfaction for his charges. R. Lut. 533.

To pay upon condition, that they mutually acquit each other of all things submitted. R. 3 Lev. 18.

To pay so much charges as the prothonotary taxes. R. 1 Sid. 358.

So, if an award be compleat, though by some clause it refers to a future proof; that shall be rejected. R. 1 Rol. 250. l. 40. 257. l. 35.

If an award be to all matters, except obligations, &c. it is good; for this exception is an award, that the obligations shall stand in force. R. 2 Cro. 278. 1 Bul. 123.

(E. 16.)
Intire.

So an award ought to be intire: and therefore, if it be made part at one day and part at another, though all be made before the time limited for it, it shall be void. 1 Rol. 250. l. 5.

So, if it refer any matter to their future determination. 1 Rol. 250. l. 17.

But the arbitrators may assemble, and settle the matters at several days, but their award upon the whole must be intire. 1 Rol. 250. l. 12.

(E. 17.)
Advantageous.

So an award ought to give a benefit, or satisfaction for the thing submitted. And therefore if an award orders nothing to be paid, or done, it is not good. 1 Rol. 251. l. 50.

So, if it order, that one shall make his law, that he is not guilty. 1 Rol. 251. l. 52.

Or, shall have his goods again. 1 Rol. 251. l. 54.

Or, parcel of his goods. 1 Rol. 252. l. 5.

So, if an award be that one shall go to Rome; for this is no advantage to the other. 1 Rol. 252. l. 29.

Shall enter a discontinuance, or be nonsuited. 1 Rol. 252. l. 50.

Shall release land to him, who has no right or possession in it. 1 Rol. 252. l. 31.

So, if an award be that both parties shall intermarry; for it does not appear to be any advantage. 1 Rol. 252. l. 27.

That A. pay so much for all sums due to B. out of the estate of Wolly, without shewing that A. is executor, administrator, or trustee, &c. for W. R. 2 Lev. 235.

But an award, that one shall be quit against the other, is good; for this is a mutual advantage. 1 Rol. 252. l. 7.

That

That the one shall enter a retraxit; for that is a bar. 1 Rol. 253. l. 2.

That the one shall have his goods, where it appears, that the other has a demand upon them. 1 Rol. 252. l. 15.

That one shall release all his right to the other, though it does not appear, that he has any right. 1 Rol. 252. l. 41.

That all differences do cease; for that amounts to a release. Mod. Ca. 34, 35.

(E. 18.) When an Award is void for the Whole.

If an award be void for all that is to be done on one part, it is void for the whole. R. 1 Rol. 258. l. 5. 260. l. 15.

So, if it be unreasonable, or defective. R. 2 Cro. 353.

Vide post, (E. 19.)

(E. 19.) When only in Part.

But an award may be void for part, and good for the residue. R. 2 Sand. 293. *2 Will. 268, 293.*

And therefore, if an award be of matters out of the submission, it is void only for those. *Vide ante* (E. 8.) R. Pal. 109.

So an award, *that one shall pay so much, and that all actions shall cease between them, and that the other shall give a release at a day after the submission*, though void for this, shall be good for the residue. R. 1 Rol. 259. l. 5. 260. l. 5. R. 10 Co. 131. b.

So an award unreasonable, or impossible in part, shall be good for the residue. 1 Rol. 259. l. 15.

Yet, if by the nullity of the award in any part, the one shall not have all the advantage intended him as a recompence for that which he does to the other, it shall be void for the whole, though it would be mutual, notwithstanding the null part were rejected.

As, an award, *that A. pay 10l. and B. his wife and son convey land to him*, is void for the whole; for though by the conveyance of B. the award would be mutual, yet he has not all the benefit intended for him, for perhaps the estate was in the wife and son. R. 1 Rol. 259. l. 30. 45.

An award, *that the plaintiff pay the defendant for his taskworth and day's work, and then that the defendant pay 25l. and that they give general releases.* R. 2 Sand. 293.

(E. 20.) When an Award by Parol shall be void.

So a parol award shall be void, which awards money to be paid by one and a release by the other; for there is no remedy for the release, where the award was by parol. R. 1 Sid. 160. for a parol award gives no remedy for a collateral thing. 1 Lev. 113.

But an award by parol may be good;

Though not the express words, but the effect and substance of them only are mentioned. R. Carth. 157.

Though

Though the submission says, *ita quod it be made and ready to be delivered, &c.* for when it is agreed, it is ready to be delivered. *R. Mod. Ca. 160, 176. 1 Sal. 75.*

Vide ante, (E. 5.)

(F) Umpire.

IF there be a submission to arbitrament, it may be, *that if the arbitrators do not agree, the parties shall stand to the umpirage of such an one.*

Or, *if they do not agree, for all the matters, they shall stand to an umpirage for the residue.* *1 Rol. 262. l. 50.*

And the words shall be construed liberally; and therefore, a submission to the award of *A. and B. and D. being an umpire*, is tantamount, as, that *D. shall be umpire.* *R. 1 Rol. 262. l. 5. Vide Hard. 44.*

And if the umpire elected refuse, they may elect another *toties quoties.* *R. 3 Lev. 263. 2 Vent. 114, 115. Dub. Sho. 76. Acc. per 3 J. Poll. cont. 5 Mod. 457. Cont. per Holt. 9 W. 3.* Unless the election of him who refuses be conditional, *if he does accept it.* *1 Sal. 70.*

If the submission be, *so that there be an award before the 1st of M. and if they don't agree, to stand to an umpire*; they may elect after the 1st of *M.* *2 Mod. 169.*

If there be a submission to an arbitrament, and afterwards to an umpirage, the umpire has no authority till the arbitrators disagree.

Or unless they do not agree; for if the submission be *if the arbitrators cannot agree to an umpire*, it is sufficient, if they do not agree, though they never talk of the matter. *R. 1 Rol. 261. l. 30.*

And therefore, if they agree for part of the things submitted, the umpire cannot make an award, unless it be specially so limited. *1 Rol. 262. l. 45.*

If a submission be to the award of *A. and B. and if they don't agree that they shall chuse an umpire*; they cannot chuse till their time is expired. *R. 1 Sal. 70. R. cont. for by chusing an umpire the arbitrators determine their power. R. 1 Sal. 71, 72.*

*But now it is decided, that arbitrators having power to elect an umpire, may elect one before they enter into the examination of the matters referred to them at all. *2 Term Rep. 644.**

[And if arbitrators (having power) chuse an umpire who makes an umpirage, the arbitrators joining in it, it is not void, for it is the umpirage of the umpire only. *Soulby v. Hodgson, P. 4 G. 3. 3 B. M. 1474. *1 Black. Rep. 463.**]

So if a submission be to an arbitrament *to be made before the 1st of May*, and if they don't agree to the umpirage of *J. S. to be made before the said 1st of May*; the umpire never can make an award; for he has no authority till the arbitrators cannot agree, and they have time till the 1st of *May*, when the power of the umpire ends. *R. 1 Rol. 261. l. 40. Vide 1 Sal. 71, 72.*

Though

Though it be alledged, that the arbitrators *deservissent & denegassent* to make an award at a time precedent. *R. 1 Rol. 262. l. 25. Semb. cont. 2 Sand. 132. 1 Sid. 428. 1 Lev. 302.*

Yet a submission, and if they do not agree within ten days, that they shall name another, who shall finish within ten days; if they do not agree, they may elect another, who shall make an award within the same ten days; for upon the election of an umpire the authority of the arbitrators ceases. *R. 1 Rol. 261. l. 45.*

So a submission to an award to be made upon or before the last day of May, if they do not make it, that they shall name an umpire who shall make it afterwards, though the arbitrators have the whole last day of May to make the award, yet the election of an umpire, if it appears that they did not make an award, upon that day, is good. *R. 1 Rol. 262. l. 10. Cro. Car. 263. Agr. 2 Sand. 133. Vide 1 Sal. 71, 72.*

So a submission to an award to be made before 1st of May, and if they do not make it, to an umpire to be made before the same day; if one arbitrator dies before the day, the umpire may make an award before the day. *Semb. 2 Sand. 132.*

So if the arbitrators absolutely refuse to intermeddle. *Per 3 J. Twissd. cont. 2 Sand. 132. Cont. per Pollexfen, but 3 J. Semb. Acc. 2 Vint. 116.*

(G.) Breach of an Award; what shall be.

IF a man does not do all that the award requires of him, it will be a breach: As if an award be, that *A. enjoy an house paying rent to B.* if he does not pay the rent, it will be a breach. *R. Cro. El. 211.*

[Money awarded must be paid, though the party has a counter demand. *Barnes 56.*]

(H) What not.

BUT failure in a matter collateral to the award is not a breach: As if an award be, that *A. make a lease to B. rendering rent*; if *B.* do not pay the rent, it is no breach, for *A.* has a remedy for it by distress. *R. Mo. 3.*

[If defendant is in custody, and an award made that he shall pay plaintiff money at a future day, he shall not be discharged till the money is paid. *Barnes 54.*]

So if a release be awarded, and the party makes a release and delivers it to the use of *B.* in his absence, it is sufficient; though *B.* to whom the release ought to be made, afterwards disagree to it. *R. Cro. El. 54. 2 Leo. 110.*

(I. 1.) Remedy for not performing an Award.

IF there be a submission by obligation or covenant, and the award be not performed, an action lies upon the obligation, &c. *Vide post*, (I. 4.)

If the submission be by rule of court, and the award be not obeyed, there shall be a prosecution for the contempt. *Vide ante*, (D. .)

* And a motion to set aside an award must be made before the last day of the next term after the publication of it. Otherwise such application is too late, and an attachment for non-performance of it may issue. *Cowp.* 23.*

* But such attachment is only in the nature of a civil action, and therefore a defendant cannot be arrested on it on a Sunday; and the case in 1 *Atkyns* 58. that he may, is not law. 1 *Term Rep.* 266.*

[It is discretionary in the court, whether they will enforce the award by process of contempt, or not; and where there are contradictory affidavits, they will leave it to be determined by action. *Hales v. Taylor*, P. 12 G. Str. 695.]

[If plaintiff has brought action for not performing an award made a rule of court, the court will not grant attachment. *Stock v. Huggens*, P. 8 G. 2. B. R. H. 106. *Anon.* M. 12 G. 2. *Andr.* 299.]

[Unless plaintiff undertakes to discontinue his action. *Anon.* M. 12 G. 2. *Andr.* 299.]

[If there is a verdict for security and matters are referred by rule, which is made rule of court, and an award for defendant to pay, &c. if plaintiff elects to proceed on the verdict, he must have leave of court; and there must be affidavit of execution of award. *Barnes* 57, 58.]

If the submission be by parol, *assumpsit* lies for non-performance.

1 *Rol.* 7. l. 15.

Otherwise, if a collateral thing is awarded, and not money. R. 1 *Rol.* 7. l. 15. *Vide post*, (I. 3.)

(I. 2.) By Debt.

Or debt lies for a sum awarded. 2 *Cro.* 354. 1 *Leo.* 71.

If there be debt for a sum awarded, it is sufficient to shew so much of the award, as suffices to maintain the action.

And therefore, if the plaintiff declares *inter alia arbitratum fuit*, it is good. *Per* 2 *Judg. Lit.* 312. *Cont. per Twissell* 1 *Mod.* 36.

[In debt on an award, the declaration must aver a mutual submission, though not on an action on the bond. *Dilley v. Polhill*, H. 5 G. 2. Str. 923.]

[In debt on the award, plaintiff need not set forth the whole award, only what is necessary to support his claim, and defendant may

may impeach award if he can; if the action is on the obligation, it must set out the whole award. *Perry v. Nicholson*, P. 30 G. 2. 1 B. M. 278.]

So if the declaration be, *that so much was awarded to the plaintiff*, without shewing the award of the other part, it is good; for the defendant shall not plead, *nul tiel arbitrament*, but *nil debet*, and if no award, or a void award be given in evidence, the issue shall be for the defendant. R. after verdict. *Litt.* 312. R. 1 Leo. 72. per *Twifd.* 1 Sid. 161.

So if it was demurred to the declaration. Per *Harvy, Richardson* cont. *Litt.* 312.

And the plaintiff need not shew the time, or place of the award made. *Semb.* 2 *Brownl.* 137.

Nor make a *profert hic in cur'* of the award. *Sti.* 459. *Vide in Pleader.* (O. 3.)

But in debt for a sum awarded, if the plaintiff shews a defective award, though more than he need to do, the declaration is bad. *Litt.* 313.

As if he shew an award of money on one part, and a release on the other part, when the submission was by *parol*, and therefore no remedy for the release. R. 1 Sid. 160. *Vide in Pleader*, (C. 29.)

[In debt on award, to pay, &c. and that they shall give mutual releases to the date of the bond of arbitration, judgment shall not be arrested because it does not appear on the record that there was such bond, though it might have been a good objection at trial. *Bell v. Simpson*, M. 27 G. 2. 2 *Wilf.* 10.]

[On *nil debet* pleaded partiality in the arbitrators, cannot be given in evidence. *Willis v. Maccarmick*, M. 3 G. 3. 2 *Wilf.* 148.]

(I. 3.) By *Assumpsit*.

If *Assumpsit* be brought for not performing an award, the declaration ought to shew an arbitrament good in all respects: And therefore, if it shews an award on one part only, it is bad. R. *Cra. El.* 924.

* A submission to an award between A. and B. the parties on the record having been made a rule of court, which award not having been made in time, the dispute had been referred by B. and C. who were the real parties in the suit, to a second arbitrator, no attachment can issue against B. for not performing the award of the second arbitrator, because the reference should be made by the parties on record; and even in that case there should have been another rule to make the second submission, a rule of court. 2 *Term Rep.* 643.*

So if an award be by *parol*, and decrees money to be paid on one part and a release on the other, it is void, and *assumpsit* does not lie upon it; for an award for a collateral thing cannot be without writing, and therefore it is only on one part. R. 1 *Lev.* 113. 1 *Ed.* 160. *Dan.* 27.

(I. 4.) By Action upon the Obligation, &c.

(I. 4.)
How the
defendant
shall plead
to it.

If an action be upon an obligation, &c. for performance of an award; the defendant cannot plead performance generally; but after *oyer* of the obligation and condition, the defendant must shew the award, and how he has performed it. *Mo. 3.*

And must shew performance of the whole award on his part. *R. 3 Lev. 24.*

Or a tender and refusal, which is tantamount. *Ibid.*

Yet if an award be to pay money in a will, or an indenture, &c. the defendant need not shew the will, or indenture at large; for if he refers to them generally, it is sufficient.

R. 1 Vent. 87.

Except the award refers to a payment at the time or in the manner mentioned in such indenture, then the defendant shall shew the indenture. *1 Vent. 87.*

And it is sufficient, that the defendant alleges, that he performed as much as the words of the award require him to perform: As if an award be, *that a suit do cease, and the plaintiff stand acquitted of it*, it is sufficient to say, *that he did not prosecute the suit, but the plaintiff stetit inde quietus*, without shewing a discharge in fact. *R. 2 Cro. 340. 2 Bul. 93. 1 Rol. 7.*

So to debt on an obligation for performance of an award, the defendant after *oyer* of the condition may plead, *quod arbitratores nullum fecerunt arbitrium*. *2 Sand. 184. Lev. Ent. 40.*

If he pleads *nul agard*, he can say nothing by rejoinder, but what shews the award void. *R. 1 Lev. 245.*

If an award be void, it is safest to plead *nul tiel agard*; for if he sets out the award, and pleads performance, the plaintiff by his replication may say, that the award was also in such a manner, (which will make it good) and join issue upon the performance, and the defendant cannot afterwards deny or traverse the award. *Dub. 3 Lev. 164. R. 1 Rol. 6.*

And if the defendant plead a bad plea, the plaintiff may demur, and shall have judgment without shewing the award in his replication, or assigning any breach. *R. 3 Lev. 17.*

Yet if he plead *nul agard*, and the plaintiff shews an award upon a submission *ita quod, &c.* he cannot say, that there were other contests of which there was no award; for that will be a departure. *R. 1 Lev. 127. Vide Pleader, (F. 7, &c.)*

(I. 5.)
Plaintiff, by
his replica-
tion, must
shew the
award, and
assign a
breach.

If the defendant plead *nullum fecerunt arbitrium*, the plaintiff by his replication must shew the award, and assign a breach of it. *Lev. Ent. 40. Vide post, (I. 6.)*

And the plaintiff in debt upon the obligation must shew the whole arbitrament; and therefore, to say, *inter alia arbitramentum fuit*, is not good. *Semb. Lit. 313.*

So if he shews an award, which has a material variance, it will be a bar; if the defendant prays *oyer* or joins issue; *1 Sal. 72.*

And he must shew the time, and place of the award made. *R. 2 Vent. 72. 9 H. 6. 5. a. Cont. 3 Lew. 239.*

And what arbitrators made it. *Agr. 9 H. 6. 5. a. Bro. Arbitrament 1.*

If the arbitrament shewn be void, the defendant may demur, and shall have judgment for him. *Vide post, (I. 6.)*

*But if the award be good as to part, and bad as to part, though he must set out the whole award, yet he may assign as a breach only non-performance of that which is good, and on demurrer which confesses the breach assigned, judgment shall be given for the penalty of the bond, which will be a bar to any other action on the same bond. *2 Wils. 268.**

If the defendant shew an award imperfectly in his bar, the plaintiff in his replication must shew the whole award, otherwise he might be tricked. *1 Sand. 326.*

So the plaintiff by his replication must shew, that the award was made in all points pursuant to the authority of the arbitrators. (I. 6.) And that it was pursuant to the authority.

And therefore, if an award ought to be made before such a time, the plaintiff shall shew it was made accordingly.

If it ought to be *signed, sealed, and delivered* by the arbitrators; if he says, that it was *sealed and delivered*, and does not alledge that it was *signed*, it is not well. *R. 1 Rol. 245. l. 10. R. cont. Pal. 97.*

If a condition be *ita quod, it be made and to be delivered, &c.* he must say, *that it was delivered*; for, *ready to be delivered*, is not sufficient. *Dub. 2 Rol. 246. l. 25.*

If it ought to be *ready to be delivered to the parties before such a day*, he must shew that it was *ready to be delivered accordingly*. *R. 1 Rol. 416. l. 5. to 35.*

If it ought to be *ready to be delivered at London 5 Dec.* if it be alledged, that the award was made at *York 4 Dec. ad tunc et ibidem ready to be delivered at London*, it is not sufficient. *Per two J. 1 Cont. 2 Cro. 577, 8.—Court divided, 2 Rol. 193. 3 Mod. 331.*

If it be alledged, that it was made *ante exhibitionem bille, viz. 24 J.* which is the day in the submission; it will be bad upon a special demurrer, otherwise upon a general; for it ought to be, *ante tempus limited by the condition.* *1 Sid. 370.*

[If award was to be made in writing under hand and seal, and plaintiff replies it was made in writing, it is not well. *Henderson v. Williamson, M. 5 G. Str. 116.*]

If it ought to be *under hand and seal*; if he does not alledge, *that it was sealed*, it is bad. *R. 2 Cro. 278.*

Or if he does not say *under his hand*, though he produces the award sealed. *R. 2 Mod. 77. R. Pal. 109, 112, 121. 2 Rol. 243. 1 Bul. 110.*

If it ought to be delivered, (*utrique*) to either of the parties, he ought to alledge a delivery to both. *R. 2 Rol. 250. l. 30. Cro. El. 797.*

So a *parol* award, if it be pleaded, *that it was ready to be delivered*, is good; for when it is pronounced, it is a delivery. *R. 1 Sal. 75. Mod. Ca. 160, 176.*

If an award be pleaded, *ready to be delivered 20 May*, where the submission was *ita quod paratum sit, to be delivered 1 May*, it will be bad. *R. 2 Sand. 73.*

If the condition be, *ita quod the award be made post obligationem ante 1 June*, and the obligation is dated 25 March, and the defendant pleads, *post 25 Martii, before 1 June no award made*; for perhaps it was made on 25 March. *R. Jon. 67.*

Yet it shall have a reasonable intendment: and therefore, if there be a submission of a certain particular, if the plaintiff recites the submission, and says, *super quo arbitratores accepto onere arbitrandi ordinauerunt*; it shall be intended, that they made their award of the particular submitted. *R. Al. 51.*

If there be a submission, *to be delivered such a day and place*; if he alledges a delivery to the parties the day before, it is sufficient. *R. 2 Lev. 68.*

To be delivered to the party who desires it; it is not necessary to alledge, that it was delivered. *Dan. 557.* for it shall come from the other side, that it was desired. *R. 3 Mod. 330. Sho. 242.*

To be delivered utrique partium, it is sufficient, if he alledges a delivery to each severally. *Dan. 557.*

So it is not necessary to aver *parat' deliberand'*; for if it be made it is implied. *R. Hard. 399. R. Sho. 98. R. 1 Sal. 69. Carth. 158.*

If he shews a delivery to the parties before the day, and at another place, it is sufficient. *Per three J. Hale. cont. 2 Lev. 68.*

So if there be an award for more matters than were submitted, and the plaintiff alledges *non performavit in aliquo*; it shall be intended only of the part within the submission. *R. 2 Rol. 46.*

If an award was by *parol*, it is sufficient to shew the substance or effect of it; for the words are not necessary. *R. 2 Vent. 242.*

And it is sufficient, though the expression was not so exact. *2 Vent. 242.*

[If the bond is *to pay whatever A. shall be awarded to pay*, and *A. is awarded to give his note payable at a future day*, it is the same as if he was awarded to *pay at a future day*. *Booth v. Garnett, M. 11 G. 2. Str. 1082.*]

If there was an award to do two things, and as to one, it is not within the submission; it is sufficient to say, that he performed the other.

So if an award be, *to pay so much, or give surety for so much*; it is sufficient to say, *that he did not pay*, for the other part of the disjunctive was void. *R. Sav. 120.*

If the defendant plead *nul tiel award*, it is not sufficient, that the plaintiff shews the award, but he must also assign a breach. *Tel. 78. Vide in Pleader, (F. 14.)*

So

So if he plead a matter tantamount ; as, that the arbitrators did not make it, but the umpire. *Semb. Lut. 529.*

But if the defendant plead a collateral matter, &c. and the plaintiff join issue upon it, he need not assign a breach. *Yel. 79. Lut. 528. R. 3 Lev. 24. Vide Pleader, (F. 15.)*

The plaintiff can assign only one breach.

How the breach ought to be assigned, *vide in Pleader, (C. 45.)*

If the plaintiff by his replication shews an award, and assigns a breach ; and it appears, that the award is not good or not well pleaded, the defendant may demur. *Lev. Ent. 40.*

So if the plaintiff does not assign a good breach. *Lev. Ent. 43.*

If the plaintiff shews an award and assigns a breach ; the defendant cannot afterwards alledge payment, or performance of the thing in which the breach was assigned ; for that will be a departure. *Vide in Pleader, (F. 7, &c.)*

When Arbitrament is a good Plea, or not.

Vide Accord, (D. 1, 2.)—Pleader, (2 G. 9.—2 V. 9.—2 W. 41.—3 M. 13.)

When it shall be confirmed, or avoided in Chancery.

Vide Chancery, (2 K. 1., &c.)

ARBITRATOR.

Vide Arbitrament, (B.—C.)

ARCHBISHOP.

Vide Ecclesiastical Persons, (C. 1.)—Esglise, (H. 11.)—Heresey, (B. 2.)—Visitor, (A. 5.)—Courts, (N. 1.)

ARCHDEACON.

Vide Ecclesiastical Persons, (C. 5.)—Visitor, (A. 9.)—Courts, (N. 9.)

ARCHES.

Vide Courts, (N. 3.)

ARMS.

A R M S.

Arms.*Vide Juslices of Peace, (B. 12.)—War, (B. 4.)***Arms, and Armories.***Vide Norroy, (C.—D.)***Serjeant at Arms.***Vide Chancery, (D. 6.)***Arm of the Sea.***Vide Navigation, (B.)*

A R R A I G N M E N T.

Vide Appeal, (G. 2.)—Indictment, (M.)—Juslices, (T. 3.—W. 2.)—Juslices of Peace, (D. 14.)—Parliament, (L. 16.)

A R R A Y.

Challenge to the Array.*Vide Challenge, (B.)***Commission of Array.***Vide War, (B.)*

A R R E S T.

Arrest.*Vide Dignity, (F. 3.)—Execution, (C. 12, 13.)—Privilege, (A. 1. &c.)***Arrest of Judgment.***Vide Pleader, (S. 47.)*

A R S O N.

Vide Juslices, (P. 1.—Y. 6.)

A R T I C L E S.

Articles of Agreement.

Vide Chancery, (2 C. 1, &c.—3 Z. 11, 12.)

Articles of Impeachment.

Vide Parliament, (L. 21, 22.)

Articles of Religion.

Vide Esq. lise, (N. 10.)

A S S A R T.

Vide Chase, (N. 9.)

A S S A U L T.

Vide Battery, (C.)—Pleader, (3 M. 15, 21.)

ASSEMBLY UNLAWFUL.

Vide Forceable Entry, (D. 10, &c.)

A S S E N T.

Assent.

Vide Parliament, (G. 18, 19.)—Parson, (C.)

Assent to a Legacy.

Vide Administration, (C. 5, &c.)—Chancery, (3 G. 4.)

Royal Assent.

Vide Parliament, (G. 21.—L. 42.)

A S S E S S M E N T.

Assessment of Damages.

Vide Damages, (E. 1, &c.)

Assessment of a Fine.

Vide Leet, (N. 4.)

Assessment of Sewers Tax.

Vide Sewers, (E. 2, 6, &c.)

A S S E T S.

(A.) Assets by Descent; what shall be.

*What shall
be assets in
equity, vide
in chancery,
(2 G.I. &c.)*

ALL lands and tenements in fee-simple, which descend to the heir, are assets to satisfy a debt, for which his ancestor has bound his heirs. *Vide Descent, (A.)*

If a reversion after an estate tail, come into possession, it shall be assets. 3 *Mod.* 254, 257. 3 *Lew.* 286. *Sbo.* 244. *Carth.* 127.

Though it be land in *ancient demesne*. 1 *Rol.* 269. l. 10. *Hob.* 48.

Or in *Ireland*. 1 *Ver.* 419.

So an advowson shall be assets. *Co. L.* 374. b. *Bro. Affets* 4. **Str.* 879.*

And if land be devised to the heir, and the quantity or quality of the estate is not thereby changed; he takes by descent, and it shall be assets. *R.* 2 *Leo.* 11. *Dy.* 124. a. *R.* in *C. B.* inter *Clarke and Smith*. *Paf.* 12 *W.* 3. (*Comyns's Reports* 72.) 1 *Sal.* 241. and *Hil.* 1 *Ann. B. R.* inter *Redding and Royston*. (*Comyns's Reports* 123.) 1 *Sal.* 242.

As if it be devised, charged with a rent, or payment of money. *R.* inter *Clarke and Smith*. (*Comyns's Reports* 72, 73.) 1 *Sal.* 241.

[If the ancestor devise lands to the heir for payment of debts, though they are a charge on the land, yet the heir is in by descent, for the tenure is not altered. *Allam v. Heber*, *T.* 21 *G.* 2. *Str.* 1270.]

And land shall be assets in the heir before his entry. 1 *Rol.* 269. l. 17.

So if a rent in fee issuing out of the land of an heir descend to him, it shall be assets, though the rent be extinct; for it has continuance for such purpose. *Co. C.* 374. b.

So a reversion, expectant upon an estate for life, shall be assets. *Bro. Affets* 17, 23. 1 *Rol.* 888. l. 15. *R.* *Carth.* 129.

[Reversion after a term of 500 years, is immediate assets in the hands of heir by descent. *Villers v. Handley*, *H.* 30 *G.* 2. 2 *Wilf.* 49.]

By the *ſt. 29 Car. 2, 3.* An eſtate *pur auter vie*, which comes to the heir as ſpecial occupant, ſhall be aſſets by deſcent, as in caſe of lands in fee-ſimple.

So by the ſame *ſt. ceſtuy que truſt* dying, if he leave a truſt in fee to deſcend to his heir, ſuch truſt ſhall be aſſets by deſcent; and the heir ſhall be chargeable with the obligation of his anceſtor by reaſon of ſuch aſſets, as fully as if an eſtate in law had deſcended in like manner.

The heir ſhall be charged, if he has aſſets by deſcent the day of the original purchaſed, or afterwards. *1 Rol. 269. l. 25.*

If the heir alien the aſſets by fraud before an action commenced, yet he ſhall be charged. *1 Rol. 269. l. 31. Dy. 149. a. in marg.*

And now, by the *ſt. 3 & 4 W. & M. 14.* All wills, diſpoſitions, &c. of lands, rents, &c. by any ſeiſed in fee in poſſeſſion, reversion or remainder after 25 March, 1692, as to creditors only ſhall be void (unleſs made for payment of a real debt, or for portions of younger children in purſuance of an agreement before marriage). And the creditor may maintain an action againſt the heir and ſuch deviſee jointly.

And by the ſaid ſtatute, if the heir alien the aſſets before an action againſt him, he ſhall be liable to the value of the land ſold.

And by the ſame ſtatute, the deviſee ſhall be liable, though he alien the lands deviſed before action brought.

(B) What not.

BUT a reversion in fee, expectant upon an eſtate tail, ſhall not be aſſets, 'till it comes into poſſeſſion; for it may be ſhocked by the tenant in tail at his pleaſure. *1 Rol. 269. l. 15. Don. 577. 6 Co. 42. a. R. Carth. 129.*

So a ſeignory in *Frank-almoigne* is not aſſets; for it is not valuable. *Co. L. 374. b.*

Nor, a ſeignory of homage and fealty. *Co. L. 374. b.*

Nor land in *Scotland.* *1 Ver. 419.*

So land, which deſcends to the iſſue in tail, is not aſſets; for it muſt be a fee. *1 Rol. 269. B.*

Nor, a term in truſt to attend an eſtate tail. *Per Hale, Hard. 489.*

Yet the truſt of a term, which attends an eſtate in fee, ſhall be aſſets. *Per Hale, Hard. 489.*

So an annuity in fee is not aſſets, becauſe it is perſonal. *Co. L. 374. b. Bro. Aſſets 26.*

A copyhold which deſcends in fee ſhall not be aſſets. *4 Co. 12. a.*

So an uſe at common law, or a truſt now, ſhall not be aſſets in law. *Co. L. 374. b.*

Nor, the truſt of a term, ſince the *ſt. 29 Car. 2.* for that extends only to a truſt of land in fee. *2 Ver. 248. Vide ſupra.*

Nor, a right to enter into land. *Co. L. 374. b. 6 Co. 58. b.*
 Or, to have an action for the land. *Co. L. 374. b.*

So a rent-seck in fee shall not be assets, till he has recovered seisin. *6 Co. 58. b.*

If land be devised to the heir, it is not assets, where he takes by the devise: as if land be given to him and his heirs upon condition to pay his debts, and if he do not pay to another. *R. Cro. Car. 161. Per two J. 2 Mod. 286. R. afterwards com. Vide in Devise, (K)*

If gavelkind land be devised to two sons, equally to be divided, whereby they are tenants in common. *R. 1 Leo. 315.*

So, if a devise be of land to the daughters and their heirs; for they shall take jointly. *R. Cro. El. 431. R. Hill. 1 Ann. B. R. inter Redding & Royston, (Comyns's Reports 123.) 1 Salk. 342.*

If the heir had aliened the assets before an action commenced *bonâ fide*, he would not be charged before the *st. 3 & 4 W. & M. 14. (quod vide ante, (A.) 1 Rol. 269. l. 30.*

Though he afterwards repurchase it. *Semb. Bro. Assets, 1.*

How the heir shall plead assets by descent, and shall be charged. *Vide in Pleader, (2 E. 3, &c.)*

(C) Assets enter Mains; what are.

AL L chattels real and personal, which come to the executor or administrator, shall be assets in their hands for payment of debts and legacies.

What things are chattels, *vide Biens, (A. 1, 2.)*

So if an executor or administrator has a villein, who purchases land in fee, into which the executor enters; though he has a fee in this, yet it shall be assets in his hands. *Off. Exec. 104.*

So if a man devise land to an executor to be sold, this before sale shall be assets. *Semb Dy. 264. b. Cont. 2 Ver. 106. But the money after the sale, is assets. Ibid. Semb. 2 H. 4. 21. l.*

* So, where the testator directed that all his estates should be sold, and after payment of certain sums, the remainder should be vested in his executors, for the payment of debts, the money arising from the sale was held to be equitable assets. *1 Brown 135.*

So if he devise land to A. on condition to sell, and make A. executor who sells; the money is assets. *3 H. 6. 3. b. R. 1 Rol. 920. l. 25, 40. R. 2 Ver. 406.*

So if a man die seised of an estate in fee, of land in the foreign plantations; this shall be assets in the hands of his executor for the payment of debts. *R. 2 Vent. 358. 2 Cha. Ca. 14. 1 Ver. 453.*

An estate limited to A. his executors or administrators for their lives, was assets in the hands of the executor by the common law. *2 Ver. 719.*

By the *st. 29 Car. 2, 3.* If there be no special occupant of estate *per auter vie*, it shall go to the executor or administrator the grantee, and be assets in his hands.

Thou

Though it be a rent granted *per auter vie*, of which before there could not be an occupant. *R. in C. B. Mic. 6 Ann.*

But an estate *per auter vie*, his assets only *quoad* creditors for payment of debts. *R. per totam curiam B. R. Mic. 8 W. 3. inter Oldham and Pickering. Sal. 464.*

And therefore shall not be distributed, nor bound to the payment of legacies. *R. Sal. 464.*

So by the *st. 29 Car. 2. 3.* It shall be assets by descent in the hands of the heir, as lands in fee, and therefore, shall be assets only for debts by specialty. *2 Ver. 719.*

But if it be assigned in trust for *A.* and his wife for life, and afterwards for *B.* his executors and administrators; it shall be assets generally in the hands of *B.*'s executor. *R. 2 Ver. 719.*

So things which come to an executor by reason of his executorship, are assets, though they never were in the testator: As if land be devised to the executor to be sold; the money raised by the sale shall be assets in his hands. *1 Rol. 920. l. 15, 25, 40. 1 Leo. 225. R. Hard. 405. per Twissd. 1 Lev. 224. R. 2 Ver. 405.*

So if he makes a feoffment to the executor of the lands to be sold. *1 Rol. 920. l. 13.*

So if a term for years be devised to *A.* for life, then to *B.* who dies in the life of *A.* it shall be assets in *B.*'s executor.

So if land be granted to *A.* for life, and afterwards to his executors for thirty years; the term shall be assets, though it never could vest in the testator. *Per Manw. Dy. Cont. 3 Leo. 21. Vide 2 Leo. 7.*

If money due upon a mortgage is paid to the executor. *R. 3 Leo. 32.*

So if a lease be made, or goods delivered to an executor pursuant to a covenant, &c. to his testator.

If an executor redeem a pledge of the testator's. *1 Leo. 225.*

If the king seize the goods of the testator for his debt, which the executor afterwards redeems; the value, over and above the redemption, shall be assets in his hands. *1 Rol. 921. l. 5.*

So if an infant executor come to full age, goods in the hands of the executor *durante minore etate*, are assets, though he had not the possession of them. *R. 1 Rol. 921. l. 10.*

So if an executor deliver goods to merchandize, the profits shall be assets. *1 Rol. 920. l. 31.*

So if he put the testator's money out at interest. *Cont. 2 Ch. Ca. 35. Acc. 2 Ch. Ca. 152.*

If an executor has a lease rendering rent; the profits over and above the rent are assets. *1 Sal. 79.*

If the testator was a factor to a merchant, and had received money for his principal's goods, which comes to his executor; it shall be assets, and subject to debts of a superior nature prior to the merchant; for money cannot be known. *R. 1 Sal. 160.*

So if an executor recover damages in an action as executor, though in trespass *de bonis asportatis in viâ testatoris*; they are assets. 1 *Rol.* 920. *l.* 20.

In an action upon the case, for an escape of one in custody upon a *capias utlagatum* at the suit of the executor, as executor. *Hob.* 38.

So if he recover upon a promise made to the testator to pay money to *A.* *Al.* 1.

So if he recover a thing as an executor in *chancery*. 1 *Rol.* 920. *l.* 23. *R. Mo.* 858. *Off. Brev.* 255.

So if money be paid to him in the prerogative court, which he pays immediately to another creditor by order of the court, the same day in which an action was commenced; unless he helps himself by a special plea. *R. Dy.* 208. *a.*

If a debtee makes his debtor his executor, whereby the debt is extinct, yet it shall be assets. 1 *Rol.* 920. *l.* 50, 52. *Pl. Com.* 186. *a.* *R. Tel.* 160. *Per three J. Cro. Ca.* 373. 1 *Ch. C.* 138, 242. *Vide Administration*, (B. 5.)

Or if he makes the debtor and a stranger his executors. 1 *Rol.* 920. *l.* 50.

So if an executor release an account; so much as appears due upon the account shall be assets in his hands. *R. Cro. El.* 43.

So if an executor, when of age, release to the administrator during his minority; the money in his hands shall be assets. *Ibid.*

So if an executor submit to arbitrament, and it be awarded, that for 7*cl.* he release an obligation for 10*cl.* the 10*cl.* shall be assets; for the submission is his own act. *R. 3 Leo.* 53. *Vide Administration*, (J. 1.)

So if a *feme* executrix, possessed of a term for years takes an husband, who purchases the reversion, whereby the term is extinct, yet it shall be assets. *Per omnes J. Mo.* 54.

(D) What not.

BUT if land be devised to be sold for a special purpose, as for payment of portions to his daughters; the money arising by the sale is not assets. *R. 1 Leo.* 87. *Dy.* 151. *b.* 2 *Ver.* 133, 4.

If an house with the goods be demised for years, rendering rent, and the executor receives the rent after the death of the testator, it is not assets; for the whole rent belongs to the heir. *R. Dy.* 361. *b.*

If an obligation be to pay 100*ol.* to *A.* to be vested in the purchase of lands to the use of *A.* and his wife, and the heirs of their bodies, remainder to the right heirs of *A.* and the interest of the money is paid to the executor of *A.* it shall not be assets. *R. 2 Ver.* 55.

So land, devised to be sold for payment of debts, is not assets in law till actual sale. 2 *Ver.* 106.

[If testator's estate is devised for payment of debts, the heir may demur to debt on bond, on *ſt. 3 & 4 W. & M. c. 14. Barnes 164.*]

So land devised to *A.* and *B.* to be sold for payment of debts, is not assets, though he makes *A.* executor. *1 Rol. 920. l. 30.*

So debts, due to the testator upon judgment, statute, or specialty, are not assets till actual recovery and receipt. *Off. Ex. 92.*

Nor other *choſes in action.* *Vide Off. Ex. 92.*

So goods in the possession of the testator at his death, though the property and possession are by the law vested in the executor, yet if without fraud or collusion he never had actual possession of them, shall not be assets to charge him. *Off. Ex. 157.*

So if an advowson be avoided in the life of the testator, and the executor presents after his death; it shall not be assets, for it is not valuable. *Vide Off. Ex. 93. in marg.*

So chattels, which come to the hands of an executor, shall not be assets, if they are lost without his default: As if a term for years be evicted by an elder title. *Off. Ex. 164.*

If sheep, or other beasts die. *Ibid.*

If a ship perish by tempest. *Ibid.*

If the testator's goods are destroyed by enemies. *Off. Ex. 162.*

Or stolen. *Ibid.*

So goods, in his hands as trustee for another, are not assets: As if a bond be made to *A.* in trust for *B.* it shall not be assets in the hands of *A.*'s executor. *1 Sal. 79.*

So if a bond to *A.* be assigned by him to another, with a covenant not to revoke; it shall not be assets in the hands of his executor. *Ibid.*

A S S I G N E E,

Assignee.

Vide Assignment, (B.)—Chancery, (4 N. 4.)—Covenant, (B. 3.—C. 3.)—Pleader, (2. F. 1, 2.)

Assignee of a Bankrupt.

Vide Bankrupt, (D. 24, &c.)

A S S I G N

ASSIGNMENT.

(A) What Things may be assigned.

EVERY one who has an estate, or interest in lands and tenements, may assign it: As tenant for life, for years, &c.

So every one, who has a present and certain estate or interest in things, which lie in grant may assign: As in a rent, common, advowson, franchise, privilege, &c. *Vide Grant, (C.)*

Though the interest be future: As a term for years to commence *in futuro* may be assigned; for the interest is vested *in presenti*, though it does not take effect till a future time. *Perk. Grant 91. Vide Estates.*

So a grant of so many cords of wood, to be taken by assignment of the grantor; before the wood assigned, the grantee may assign it to another; for the interest was vested immediately. *R. 5 Co. 25. a. Cro. El. 819.*

So if a mortgagee for years, (where there was a covenant that the mortgagor should continue in possession till default of payment,) assigns before entry, and without the mortgagor; the assignment is good, though he was not in possession; and so an assignment afterwards *toties quoties*. *R. 3 Lev. 388.*

If lessee for years, where the reversion is in the king, be ousted by a stranger, and afterwards make an assignment, it shall be good; for the reversion not being divested, the lessee continues in possession. *R. Cro. El. 275.*

So if a mortgagor after such a mortgage and covenant *ut supra*, lease for years, and afterwards the mortgagee assigns before entry. *4 Mod. 48.*

So the grantee of an advowson may assign before presentation. *2 Rol. 47. l. 12.*

So the grantee of an annuity *pro consilio impenso*. *R. Mo. 5.*

So if the conuzee of a statute extend the land of the conuzor, which is afterwards evicted by a conuzee of a prior statute, yet he may assign his interest; for he shall have it again after the prior statute satisfied. *R. 4 Co. 66. b. Dub. 2 Rol. 48. l. 3c.*

*So on the statute 17 G. 2. c. 24. s. 2. which gives prizes to the captor, and says that they shall be divided among the captors, as shall be agreed on by the owners, being first adjudged lawful prize, a captor might have assigned his share before condemnation, for on condemnation the property must be taken to have been vested immediately on the capture. *1 Will. 211.**

But now by s. 20 G. 2. c. 24. s. 4. such bills of sale are made void before condemnation.

(B) Who

(B) Who shall be an Assignee.

ASSIGNEES are in fact, or in law.
Under the word, *assigns*, the assignee of an assignee in *perpetuum*, the heir of an assignee, or the assignee of an heir shall take. *Co. L. 384. b.*

So, if a man covenant with another, *his executors and assigns*, the assignee of an assignee, and his executors, and the assignee of an executor or administrator of every assignee are included, and shall have covenant. *R. 5 Co. 17. b.*

But if an obligation be, *to pay such person as he shall name by his will, or writing*; there must be an express nomination, and his executor shall not take as assignee. *R. Mo. 855.*

(C) What Things cannot be assigned.

(C. 1.) Chose in Action.

FOR avoiding maintenance, &c. a *chose in action* cannot be assigned, or granted over to another. *Co. L. 214. a. 266. a.*

And therefore, a contract, or right, or cause to have an action for any duty, or wrong, cannot be assigned. *2 Rol. 45. l. 40.*

When assignable in equity, *Vide in Chancery, (2 H.)*

So, if an obligation, or other deed be granted, whereby the writing passes; yet the grantee cannot sue for it in his own name. *2 Rol. 46. l. 23, 30, 45. l. 40.*

So a right to have a writ of error cannot be assigned. *3 Co. 4. b.*

Nor can an avoidance be assigned, when the church is void. *2 Rol. 45. l. 37.*

So, if the king grant a *chose in action* to *B.* as he may by his prerogative, *B.* cannot assign it to another. *R. 2 Cro. 180.*

So, if the king's farmers covenant to pay 15*l.* to the executor of him who dies; one assigns his part; the assignee shall not have this 15*l.* for it was not assignable. *R. Skin. 6, 26.*

* But though a *chose in action* cannot strictly be assigned in law, yet in equity it may: and in the case of a policy of insurance, the court will so far take notice of an assignment, as to permit an action to be brought in the name of the assignor. *1 Term Rep. 26. **

* And the assignor, who has become a bankrupt, may sue the debtor for the benefit of the assignee, *Id. 619. **

(C. 2.) Bare Right.

So a right of entry, or re-entry cannot be assigned. *Co. L. 214. 10 Co. 48. a.*

And therefore, if a man, being disseised, convey the land to another before entry, the conveyance will be void.

So,

So, if the conuzee of a statute sue an extent, and a *liberate*, he cannot assign before entry, or recovery in an ejectment; for by the *liberate* possession is delivered to the conuzee, and if he does not enter thereupon, but suffers the conuzor to have possession, the possession of the conuzee is turned to a right, which is not assignable. *R. 3 Lev. 312. 4 Mod. 48. Sbo. 290. Sal. 563. Skin. 300.*

So, if the lord disseise his tenant, by which the seignory is suspended; during the suspension the seignory cannot be assigned. *Co. L. 314. a.*

Or, if the tenant enfeof his lord, upon condition. *Ibid.*

So, if there be tenant for life, the reversion to another, and the lord grant his seignory to the tenant for life; the grantee cannot assign this, for it never was *in esse* in him. *Ibid.*

So the king cannot assign a bare right to land, but by express words. *R. 3 Co. 4. b. 11. a.*

(C. 3.) Possibility.

So a mere possibility cannot be assigned. *Vide in Grant, (D.)*

As, if a man demise for years, *if A. so long live*; he has but a possibility to have the land during the years, which cannot be demised to another. *D. 1 Co. 154. b.*

So, if a term be devised or granted *to one for life, and afterwards to another for the residue of the term*; this remainder of the term cannot be assigned, being but a possibility. *R. 4 Co. 66. b. Vide in Chancery, (4 W. 21.)*

So, if land be granted *to husband and wife for 20 years, and afterwards to the survivor for 21 years*; the husband in the life of his wife cannot assign the term for 21 years, for it does not vest till he survives, and therefore was but a possibility. *R. 10 Co. 51. a. R. Poph. 5.*

So, if an advowson be granted to a bishop and his successors *post mortem of the incumbent*; the bishop cannot demise to another *post mortem* of the incumbent; for he has nothing till the incumbent dies, who may survive him. *R. Dy. 244. a.*

If upon a purchase of the manor of *B.* the manor of *C.* be, for the purchaser's security, limited to the vendor and his heirs till eviction, and after eviction to the purchaser, *his heirs and assigns*; if he before eviction sell the manor of *B.* to *A.* who makes a lease for years to *D.* and then the manor of *B.* is evicted, *A.* shall not have the use of the manor of *C.* for this contingent use was not assignable; and though it be limited to the purchaser, *his heirs and assigns*, the word, *assigns*, is a word of limitation, and not of purchase. *R. 2 Rol. 795. l. 40.*

If land be limited to *A. for life, remainder to the right heirs of B.* the son of *B.* cannot in the life of *B.* grant the remainder, though he afterwards survive *A.* *Poph. 5.*

If there be a devise of a term *to his son after the death of B.* the son cannot make a lease in the life of *B.* *R. Jon. 417.*

If

If there be a devise to trustees till *A.* attain his age of 25 years, and then in trust for *A.* a mortgage by *A.* before the 25 years will be void. *R. Eq. Ca. 30.**

So, if a patron grant to *A.* to be master of an hospital; he cannot grant it to another *post mortem* of *A.* for he has nothing in him; for *A.* has an estate of inheritance during his life. *R. Ca. Ch. 214, 215.* *2d part of 2 Mod. Ca.

So the patron of a prebend, donative, &c. cannot grant it to another in reversion. *Ibid.*

So if a man make a lease for 21 years in *presenti*, or in *futuro*, he cannot afterwards grant a lease to another by *parol* for the same time. *Pl. Com. 432.*

(D) Assignment by, or to the King.

YET a debt may be assigned to the king for a debt due to him. *R. 2 Leo. 67.*

Though it be not ascertained: as, debt upon bond for performance of covenants. *R. 2 Leo. 55.*

But by the *§. 7 Jac. 15.* an assignment by the debtor or accountable to the king of any debt, not originally due to him, shall be void.

Also the king may assign a *chose in action*: as, a recognizance, obligation, &c. *Dy. 1. b. 2 Cro. 82, 179. Vide Grant, (G. 1.)*

So, a debt, or other thing certain. *Dy. 1. b. in marg. 3 Lev. 135. Hard. 158.*

So, a thing for which *A.* is accountable. *3 Leo. 198.*

So, all recognizances which shall thereafter be made in *chancery*. *2 Rol. 198. l. 20.*

And the king's grantee may sue a recognizance, obligation, &c. to him granted in his own name. *Dy. 1. b. R. 2 Cro. 179. Sav. 133.*

Or, he may prosecute an extent in the king's name; for the grant of the statute or debt is a warrant to him to prosecute process in the king's name. *R. 2 Cro. 82, 180. Sav. 2, 133. Semb. Hard. 158.*

So, after an assignment, the king may release. *Sav. 3.*

But the king cannot assign an uncertain thing; as damages for a trespass. *Dy. 1. b. in marg.*

Nor, where an obligation forfeited by outlawry is assigned; the grantee cannot sue in his own name, unless he has special words to do it. *R. Dy. 1. b. R. cont. 2 Cro. 180. per Manwood, Sav. 2, 3.*

Nor, a thing real; as, a right of action or entry to lands. *3 Leo. 198.*

So the king cannot grant an obligation, &c. forfeited to him, before seizure. *R. 1 Rol. 7.*

Assignment of a Bankrupt's Estate.*Vide Bankrupt, (D. 24, &c.)***Assignment of a Bill of Exchange.***Vide Merchant, (F. 11.)***Assignment of a Breach.***Vide Pleader, (C. 45, &c.—F. 14, 15.)***Assignment of Dower.***Vide Dower, (A. 11.)—Pleader, (2 Y. 15.)***Assignment of Error.***Vide Parliament, (L. 3.)—Pleader, (3 B. 14.)***Assignment of a Mortgage.***Vide Chancery, (4 A. 8.)***Assignment of an Office.***Vide Officer, (C)***Assignment of a Trust.***Vide Chancery, (4 W. 6.)*

A S S I S E.

(A) Assise ; the several Species.

ASSISA est nomen equivocum, and sometimes signifies an ordinance. Co. L. 154. b. 159. b.

Sometimes this word signifies the writ of assise, or the jury who try it. *Co. L. 154. b.*

Sometimes it signifies all the proceedings in court upon this writ. *Terms de Ley, verb. assise.*

Sometimes the court or place, where such writs are determined. *Terms de Ley, verb. assise.*

A writ

A writ of assise lies for the recovery of lands or tenements, of which a man or his ancestors have been disseised. *Terms de L. verb. assise.*

And there are four writs of assise: an assise of *novel disseisin*, an assise of *mort d'ancestor*, an assise of *darrein presentment*, and an assise of *juris utrum*. *Co. L. 155. a.*

(B. 1.) Assise of Novel Disseisin.

AN assise of *novel disseisin* is a remedy *maxime festinum*, for the recovery of lands or tenements, of which the party was disseised. *2 Inst. 410.*

And it is called *novel disseisin*, because the justices in *eyre* go their circuits from seven years to seven years; and no assise was allowed before them, which commenced before the last circuit, which was called an ancient assise; and that which was upon a *disseisin* since the last circuit, an assise of *novel disseisin*. *Co. L. 153. b.*

And it is a speedy remedy, because the recognitors of assise are summoned by the original itself to appear at the day of the return, *Et interim habeant visum tenementorum illorum.*

The tenant shall not be allowed an essoin, or protection. *1 Inst. 410.*

Nor shall have aid, but of the king. *2 Inst. 410.*

Nor shall a stranger be received, nor vouched, unless he be present and enter immediately into warranty. *2 Inst. 410.*

Nor shall the *parol* demur for the nonage of the plaintiff, or tenant. *2 Inst. 410.*

So it is a most beneficial remedy; for the plaintiff shall recover his land, damages, and costs.

And by the common law, damages, as well as land, were not recovered in any other action.

(B. 2.) When it lies.

By the common law an assise lies only *de libero tenemento*, viz. of lands, tenements, rents, and all that whereof a *præcipe quod reddat* lay. *8 Co. 46. a.*

Of an hospital, chapel, &c. by the name of a messuage.

Of an office. *8 Co. 47. a. Vide infra.*

So it lies by the common law of common of pasture. *8 Co. 46. a. 2 Inst. 411.*

But now by the *st. W. 2. 13 Ed. 1. 25.* an assise is given in lieu of a *quod permittat*, for *profits apprender in certo loco*. *8 Co. 46. a. 2 Inst. 411.*

And it lies by a tenant for life, as well by him who has the inheritance, though a *quod permittat* does not lie for the tenant for life. *8 Co. 46. a. 2 Inst. 411.*

As, *de estoveriis bosci*. *8 Co. 46. a. 2 Inst. 409.*

De proficuo capiendo in bosco. *8 Co. 46. a. 2 Inst. 409.*

De nucibus, glandibus, Et aliis fructibus colligendis. *8 Co. 46. a. 2 Inst. 409.*

De

*De corrodio, liberatione bladi, & aliorum victualium & necessari-
orum in certo loco annuatim recipiend.* 8 Co. 46. 2 Inst. 409.

So it lies of all profits apprender in a place certain; for these are only for example. 8 Co. 46. 2 Inst. 411.

And it lies of *esflowes*, though the wood be stubbed up. *Hob.* 43.

So by the *st. W. 2. 25.* an assise is given of the tolls: as, *de tronagio, passagio, pontagio, pannagio, &c. in certis locis capiendis.* 8 Co. 46. b. 2 Inst. 409.

So it lies of toll of a market, or mill. 8 Co. 46. b.

Of a toll-thorough, toll-traverse, or toll-turn, though they are to be taken in his own soil. 8 Co. 46. b.

Of murage. 8 Co. 47. a.

Of crannage, stallage, piccage, wharfage, anchorage, pedage, &c. 8 Co. 47. a.

So by the *st. W. 2. 25.* an assise is given of offices: as, *de custodiis boscorum parcorum, forestarum, chacearum, warrenarum, portarum, & aliis ballivis, & officiis, in fee.* 8 Co. 47. a. 2 Inst. 409.

And this statute, as to offices, is but an affirmance of the common law, by which an assise lay of an office by the name of land. 8 Co. 47. 2 Inst. 412.

And though the statute speaks of offices in fee, and a *quod permittat* lies only for him who has a fee; yet an assise lies for him who has an office for life. 8 Co. 47. a.

And an assise lies of all offices of profit. 2 Inst. 412. 8 Co. 47. b.

As, of the office of a sheriff; where granted for life. 8 Co. 47. a.

Of a steward, bailiff, receiver, beadle, &c. of a manor. 8 Co. 47. a. b.

Of a prothonotary, philizer, or other office for life in *chancery*, *B. R.* or *C. B.* 8 Co. 47. a. b. 1 Lev. 1.

Of a packer of cloaths, &c. 8 Co. 47. a.

Of the master of the king's tennis play, &c. *R.* 8 Co. 45. b.

So it lies of offices in the admiralty, spiritual, or other court, as well as in the courts of common law. 2 Inst. 412. 8 Co. 47. b.

As, of register of the admiralty, or of a bishop. 8 Co. 47. b. *Dy.* 153. a.

And it lies, though the court in which the office is, be removable; if it be *in certo loco* at the time of the disseisin. 8 Co. 47. b.

So it lies, if a man be disseised of part of the profits of an office, of that part only. 2 Inst. 412. 8 Co. 49. b.

So, of a third or fourth part of an office.

So it lies for a frequent distress, if the lord distrain his tenant so often, that he cannot manure his land. 8 Co. 50.

So, if a commoner claim common in the several land of another, he may have an assise, though the freehold continues in him, and this by the common law; for the *st. W. 2. 25.* was but an affirmance of the common law. 2 Inst. 413. 8 Co. 50. b.

So

So by the *fl. W. 2. 25.* an assise is given *de communio turbarie, piscarie, & aliis communibus similibus*; for it was doubted, whether by the common law it lay of any but common of pasture.

8 Co. 48. 2 *Inst.* 412.

So by the *fl. 32 H. 8. 7.* an assise lies of a parsonage, vicarage, tithes, &c.

(B. 3.) When it does not lie.

But an assise does not lie of an office, which has not any profit to it. 8 Co. 47. *b.* 2 *Inst.* 412.

So it does not lie for a service omitted: as, it does not lie *de seisa ad molendinum.* 8 Co. 46. *b.*

Nor of homage. 1 *H. 4. 1. b.*

Nor, of a bridge not repaired, or a like nonseafance. 1 *Rol.* 104. *l.* 20.

Of not scouring a ditch, by which the land is surrounded, 1 *Rol.* 104. *l.* 22.

So it does not lie of an easement; as, of a way. 1 *Rol.* 270. *l.* 17. 8 Co. 46. *b.*

Of a passage in a barge to church, or elsewhere. 8 Co. 46. *b.*

So it does not lie of an office of charge, and no profit. 2 *Inst.* 412. 8 Co. 47. *b.*

So it does not lie of an annuity, or pension. 1 *H. 4. 1. b.*

So it does not lie of a rent reserved out of tithes only; for it cannot be issuing out of tithes. *Vau.* 204.

(B. 4.) By whom it lies.

An assise lies by a tenant in fee-simple, or in tail. *F. N. B.* 177. *A.*

So, by tenant for life. *F. N. B.* 177. *A.*

So by the *fl. 13 Ed. 1. de mercatoribus. W. 2, 18. & 23 H. 8. 6.* by tenant by *elegit*, statute merchant, or staple, or recognizance.

So, if tenant for years, or at will be ousted, his lessor may maintain an assise; for his possession is the possession of the lessor. 1 *Rol.* 271. *l.* 8. 12. 15. *Vide Seisin, (C.)*

So an heir, if the guardian be ousted. 1 *Rol.* 270. *l.* 40.

So, the heir, if a lessee for years, &c. be ousted, who claims by the demise of his ancestor. 1 *Rol.* 270. *l.* 45.

So a recoveror of a reversion, if the lessee be ousted after the recovery.

So he in remainder after a lease for years, if the lessee be ousted. *R. Kel.* 109. *b.*

So a reversioner, if a tenant by statute, or *elegit* be ousted 1 *Rol.* 271. *l.* 6.

Or, if a lessee at will grant his possession to another, who enters. 1 *Rol.* 271. *l.* 4.

So it lies by a lord, if his copyholder be ousted.

So it lies by the reversioner, if a lessee for years, or at will, of a common be ousted. 1 *Rol.* 271. *l.* 13, 15.

So

So it lies by the parson of a church.

So, if one jointenant is ousted, an assise lies by him, and his companion.

(B. 5.) By whom not.

But a tenant for years, or other who has not the freehold cannot maintain an assise.

* Nor any one who has not *sole seisin*, as the head of a college for his headship. *Per Holt. in Phillips and Bury. 2 Term Rep. 355.**

So he, who has the inheritance or freehold cannot maintain it, if he has not possession or seisin.

As, an heir cannot have assise against an abator. *1 Rol. 271. l. 10.*

So, if *cestuy que vie* dies, or the lease of a lessee for years determines, the lessor or his heir, cannot have an assise before entry, against him who takes possession after the death of the *cestuy que vie*, or the determination of the lease for years. *1 Rol. 271. l. 1.*

(B. 6.) Against whom it lies.

An assise lies against the tenant of the freehold.

And, if the disseisor be not tenant, it ought to be against the tenant, and the disseisor.

And, if the tenant be not known, it may be against the person of the profits, within a year after his title commences.

Or, against the disseisor himself at any time, if he be person at the day of the writ purchased.

If there be an assise of a rent, it ought to be against the terre-tenant as well as the disseisor.

So, if it be of an office, which concerns land.

If it be of a rent-charge, it ought to be against all the tenants of the land, out of which the rent issues. *Vide F. N. B. 178. D.*

So in an assise of a rent-seck. *Vide F. N. B. 178. D.*

But in another rent, it is sufficient, that one terre-tenant and one disseisor be named. *Vide F. N. B. 178. D.*

So it lies against the terre-tenant and disseisor, though he alien, or be ousted *pendente lite*.

But in an assise of a rent against the *mesne*, the terre-tenant need not be named.

Nor, in an assise of tithes. *Dy. 83. a. 84. a.*

(B. 7.) In what Court.

An assise must be brought in the county, where the land lies. *Vide in Action, (N. 1, &c.)*

If *B. R.* or *C. B.* be in the same county, it may be brought either in the one or the other. *F. N. B. 177. B. 4. Inst. 158.*

If either of these counts be there, it ought to be in that, and not elsewhere. *F. N. B. 177. B. Reg. 196. B.*

If neither of them be there, it shall be before the justices in eyre, without commission. *Vide F. N. B. 177. E. Vide post, (B. 21.)*

Or, before the justices of assise upon their general commission. *Vide F. N. B. 177. E. 178. A.*

Or, before special commissioners. *Vide F. N. B. 178. I. K.*

(B. 8.) The Proceedings in an Assise.

By the common law there were only two writs of assise, viz. (B. 8.)
de libero tenemento. 2 *Inst.* 411. 8 *Co.* 46. a. Writ original.

Or, *de communia pasturæ.* *Dy.* 84. a. 2 *Inst.* 411. 8 *Co.* 46. a.

And the writ shall be general, *de libero tenemento*, though it be an office, or a profit apprender, or other thing within the *st. W. 2.* 25. by the express words of the same act. 2 *Inst.* 412. 8 *Co.* 47. b.

So the writ shall be general, *de libero tenemento*, and the count special, where it is an assise of tithes. *Dy.* 83.

So, if there be an assise of frequent distress; though the plaintiff has the freehold in him. 8 *Co.* 50. a.

Or, if there be an assise, that the tenant depastured his several. 2 *Inst.* 413. 8 *Co.* 50. b.

So, if there be an assise by a tenant by *elegit*, statute, &c. *Dy.* 84. a.

The writ of assise may join several causes of action in the same writ, being founded on a tort. 8 *Co.* 87. b. *Vide in action, (G.)*

The plaintiff in an assise ought to find pledges in chancery, or before the sheriff. *Vide F. N. B. 178. C.*

Or, if the sheriff return, that he has not found any, he may find them in court.

The writ must be returned fifteen days after the *teste*.

And by the *st. articuli super chartas* 28 *Ed.* 1. 15. it may be returned at a day out of term. *F. N. B. 177. D.*

So in term it may be returned at the return day, or at a common day. 1 *Sal.* 82.

The sheriff returns as to the tenant, *quod attachiatus est*, or, *nichil habet per quod attachiari potest*.

Or, *quod A. ballivus* of the tenant *fuit attachiatus*, or, *nichil habet*.

If the tenant does not appear upon the return of the writ, or a writ be returned; the assise shall be taken by default. 2 *Lev.* 120. *Process.* (B. 9.)

The writ of assise is an attachment.

And, if it be discontinued by the justices not coming, there shall be a re-attachment against the party, and a re-summous against the jurors.

So if any defendant plead a foreign plea, which is adjourned, and afterwards remanded, there shall be a re-attachment against the defendant.

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P p

But,

But, if an assise be discontinued by the justices not coming after inquest awarded by default, there shall be no re-attachment; for the defendant, by his default before, has lost his challenges.

If an assise be removed into *B. R.* and the tenant after he has the record, will not return it; a *capias* lies against him.

If the jurors do not appear at the return of the summons, there shall be an *habeas corpora*, and afterwards a *disfringas in infinitum*.

(B. 10.)
Summons
and sever-
ance.

Summons and severance lies in an assise.

And therefore, if several join in an assise, and one plaintiff does not appear, or after appearance will not sue, there may be judgment that he be severed; and the other shall sue alone.

And, if there be a default before appearance, a summons shall be awarded against the demandant or plaintiff, who does not appear, and at the return of the summons there shall be judgment, that the other *sequatur solus*. *Vide Co. L. 139. b.*

After appearance, there shall be judgment without summons *ad sequendum simul*. *Co. L. 139. b.*

(B. 11.)
Plaint.

A plaint in an assise is in nature of a count in another action.

And the assise must be arraigned in *French*.

And that, at the return of the writ. *2 Lev. 120.*

In an assise for a thing of common right, the plaintiff as well as the writ shall be general; as, in an assise for a manor, lands, meadow, wood, &c. the plaintiff need not make a title in his plaint. *1 Sid. 73.*

Nor, in an assise for rent; for it shall be intended rent-service.

So a tenant by statute, or *elegit* need not make title in his plaint.

If the plaintiff makes a title, when he need not, it is not fatal.

Otherwise, if he makes an insufficient title.

So in an assise, the plaintiff need not shew the day or year of the disseisin in his plaint.

Nor, the certain quantity, or quality of the land; for *de quodam portione decimarum, pecia terra, &c.* is sufficient; for so much certainty is not required, as in a *præcipe*. *Dy. 84. b.*

In an assise of a mill, it is not necessary to say, what sort of mill it is, *viz.* a grist, or a fulling mill, &c. *4 Co. 87. a.*

In an assise of an office, it is not necessary to shew what the profit is. *8 Co. 49. b.*

But, if it be a new office, it must be shewn what profits were granted with it. *Ibid.*

But in an assise for things against common right, the plaintiff must be special, and the plaintiff shall make title by it: as, in an assise for a common, office, &c. *Dy. 114. b. 152. b. 153.*

1 Sid. 73. 3 Mod. 273. Vide ante, (B. 8.)

For a rent-charge or seck. *Fon. 413.*

For tithes. *Dy. 83, 85. b.*

For all profits *aprender*.

So, in an assise by executors.

And, if the title be not sufficient, there shall be judgment against the plaintiff: as, if he makes title to a rent-charge by devise, and does not shew, when the devisor died, though the jury find the rent in arrear for thirty years. *R. Jon. 414.*

Yet, if the plaint makes a title, it is not peremptory; for, if the plaintiff has any title it is sufficient.

So an immaterial variance in the title does hurt. *Dy. 153.*

In an assise of office, the plaintiff must shew in what particular the tenant took the profits. *Vide Seisin, (D.)*

The pleas to an assise are in abatement, or in bar.

In abatement, the tenant may plead, *no disseisor named, or no* (B. 12.)
tenant of the freehold. *Dy. 114. b. Co. L. 229. a. 1 Brownl. 27.* Pleas

Another jointenant of the whole not named, parcener, or tenant in common. In abatement.

By the *fl. 11 H. 6. 2. that the sheriff is named by collusion, being* For these
neither tenant nor disseisor. pleas *vide*
So, by the *fl. 9 H. 4. 5. that the lord of antient demesne, mayor,* Abatement,
&c. is named tenant by collusion, to take away his jurisdiction. in the pro-
That the plaintiff himself never was seised. per subdivisions.

So the tenant may plead in abatement, a variance, &c.

That the land lies in another town.

Other action pending for a forcible entry, &c. Other assise, quod permittat, &c. for the same disseisin.

Entry.

So a disseisor may plead in abatement, *misnomer of the plaintiff,*
or, of himself.

Coverture of the plaintiff.

Other action of an higher nature pending.

The defendant may plead in abatement, and over to the assise.

Sal. 83. Vide in Abatement, (I. 10.)

If the defendant pleads to the writ, and over to the assise; the plaintiff shall not demur, nor reply to the plea in abatement, but that shall be first tried.

But it is no plea in abatement, *that one defendant is misnamed,*
dead, &c. if there be another tenant and disseisor rightly named.

So it is no plea for a disseisor, *that there is no tenant of the free-*
hold, jointenant, &c.

That the plaintiff was seised the day of the writ.

Or, that the plaintiff never had any thing.

That the land lies in another town not named.

So jointenancy, entry, &c. as to part, abates the writ only for that part.

If the tenant in an assise pleads in bar, he ought to take the (B. 13.)
tenancy upon himself. In bar.

The general plea in bar is, *nul tort, nul disseisin.* By the ten-

So the tenant may plead specially: as, *a former recovery in* nant.
assise, &c.

That the plaintiff ousted him, and he re-entered.

That the plaintiff was not seised within thirty years.

A descent and non-claim.

A feoffment by the plaintiff with warranty; if he relies upon the warranty. Co. L. 229. a.

Warranty of the plaintiff's ancestor.

That the plaintiff himself leased to him for life, reserving the reversion to himself. Co. L. 228. b.

So he may plead, *that he leased to him for years, or, that he bought by elegit, upon a statute, &c.* if he pleads it as a justification, and concludes, *et sic sans tort.* Co. L. 228, 9.

If the plaintiff make a title in his plaint; it is not sufficient for the defendant to avoid his title, but he must make a title to himself.

If the defendant pleads a plea, which goes only to the possession, and not to the right, as a descent, &c. he must give colour to the plaintiff. 10 Co. 90. b. *Vide Pleader,* (3 M. 40.)

But a lease, or feoffment by the plaintiff himself generally is not a good bar; for it amounts only to the general issue.

So a lease for years by the tenant to the demandant, is not a good plea. *Kel.* 103. b.

If the defendant pleads specially, he may afterwards waive it, and take the general issue, *nul tort.*

Though the plea be entered, or the recognitors ready to take the assise.

Or at another day, when it is adjourned *pro defectu juratorum.*

So, if the tenant plead in bar, and afterwards demur to another out of the point of the assise, upon which the demandant has the opinion of the court for him; he shall have judgment presently, without taking the assise upon the *nul tort.* 1 *Rol.* 271. l. 35.

As, if he plead a release, which the demandant says was upon a condition, and shews how he has performed it, and the tenant demurs, and it is adjudged for the demandant. 1 *Rol.* 271. l. 36.

(B. 14.) By a disseisor. So a disseisor, being a defendant in an assise, though he be not tenant, shall plead any plea that goes in bar or excuse of damages, and not to the right of the land; as, *nul tort.*

A release of actions personal. 2 *Inst.* 414.

But a disseisor, who is not also tenant, shall not plead any thing, which concerns the tenancy of the land: as, *release of actions real.* 2 *Inst.* 414.

(B. 15.) By a bailiff. The writ of assise says, *pone, &c. A. vel ballivum suum, si inventus non fuerit, &c. F. N. B.* 177. F. And therefore, a man as bailiff to the tenant may appear and plead in his own name. *B. tanquam ballivus A. dicit, &c.* 2 *Inst.* 415.

And by the common law, neither the tenant, or the disseisor could appear by attorney, but only by bailiff. 1 *Rol.* 288. l. 47.

But now by the *st.* 12 *Ed.* 2. 1. the tenant may appear by attorney. 1 *Rol.* 288. l. 50.

Not the disseisor; for the statute does not extend to him. 1 *Rol.* 288. l. 52. *Vide Attorney*, (B. 6.)

The bailiff may plead to the writ, or in bar, every plea that may be tried by the recognitors of assise, upon which he can conclude, *et si trove ne soit nul tort, nul disseisin.* 2 *Inst.* 414.

But he cannot plead any thing not triable by the assise, or upon which he cannot conclude, *et si trove ne soit nul tort, &c.* as, he cannot plead a matter of record. *Ibid.*

And if he pleads a matter of record, the justices may proceed. *Ibid.*

Yet after a plea by a bailiff, and an assise awarded; at any time before the assise taken, the tenant may come and plead a record, deed, release, &c. and shall not be put to his certificate of assise. 2 *Inst.* 415.

If the defendant plead in bar a matter of record, as a recovery, fine, &c. the plaintiff must answer to the bar. (B. 16.)

So, if by his bar he gives a title to the plaintiff, and avoids it: as, by feoffment of the plaintiff upon condition, and an entry for the condition broken. *Replication.* When it shall answer to the bar.

So, if he gives possession to the plaintiff, and no colour; he must traverse the matter of the bar, without making a title to himself at large.

So, if he plead a matter in another county: as, a grant of a reversion, and an attornment in another county.

But generally, where the defendant makes a special bar, the plaintiff need not answer to the bar, but may make a title to himself at large: as, in all cases where the defendant gives colour. (B. 17.)

If the defendant plead a feoffment with warranty; it will be a sufficient title for the plaintiff to shew, that his ancestor died seised, and a descent to himself. *When it shall shew a title.*

When issue is joined upon *null tort*; the recognitors are sworn only to the points of the assise, *viz.* the seisin and disseisin. (B. 18.)

And if the defendant in an assise makes default, whereby the assise is taken by default; the recognitors ought to enquire only of the seisin, disseisin, and damages, and not of the plaintiff's title. *Taking of the assise.*

But, if any special matter is pleaded in abatement, or in bar, the assise shall be taken at large, *i. e.* the recognitors ought to enquire of this special matter before the seisin and disseisin. (B. 19.)

And in such case the recognitors are sworn as a common jury, and it is said, *quod assisa vertitur in jurat.* *When taken at large.*

As, if in an assise by an infant, the defendant plead a feoffment of his ancestor, and the assise is taken upon this; it shall be enquired at large, whether such ancestor was of full age, sane memory, and out of prison when he made the charter of feoffment.

So,

So, where the plaintiff traverses the defendant's bar, the jury ought to enquire only of the matter of the bar, and not of the plaintiff's title, which is made use of only as inducement to the traverse.

(B. 20.)
When taken
upon title.

So, if the plaintiff do not answer to the bar, but makes title at large, the defendant may pray a *venire assisa super titulum*; and the assise shall be taken upon the title, and they shall inquire of all circumstances which concern it.

But if the plaintiff makes title at large, by a fine, recovery, or other matter of record, the defendant cannot pray *venire assisa super titulum*; for matter of record is not triable by the assise.

So, if seisin and disseisin be confessed by the plea, the assise shall be taken in right of damages; for they do not enquire of the title, but only what damages the plaintiff has. *R. 2 Rol. 22.*

Though the confession be by *nient dedire*; as, if the defendant pleads a recovery in bar, the plaintiff by his replication confesses and avoids the recovery, to which the defendant demurs; for by his demurrer he admits the seisin, and disseisin. *R. 2 Rol. 22.*

(B. 21.)
Justices of
assise. Their
original.

By the common law, assises were taken only in *B. R. C. B.* or before justices in *eyre*. *4 Inst. 158. 12 Co. 31. Vide ante, (B. 7.)*

And these courts have an original jurisdiction for taking assises, without any patent, or commission. *F. N. B. 177. E. 4 Inst. 158.*

But, by the *st. M. Ch. 9 H. 3. 12.* it was enacted, *quod nos, &c. mitt' justiciarios nostros per unumquemque comitatum semel in anno qui cum militibus eorundem comitat' capiant assisas in comitatibus illis.*

And upon this statute, patents were directed to the justices to take assises in their proper counties. *4 Inst. 158.*

And the patent may be general, for taking all assises, or to special justices, or taking such a particular assise. *F. N. B. 177.*

And there may be another patent, for associating others to them. *F. N. B. 185. E.*

And a writ of *si non omnes*, without which they cannot proceed, if all the associates do not come. *F. N. B. 186. C.*

But, if the patent to justices of assise has not a clause, *cum his quos sibi associaverimus* there cannot be a writ of association. *F. N. B. 186. E.*

So, if there be a writ of association, a subsequent writ shall be void. *F. N. B. 186. D.*

Or, if several writs of association are made at the same time, that which is first accepted shall only be allowed. *F. N. B. 186.*

(B. 22.)
Who may
be justices.

By the *st. M. Ch. 12. justiciarii nostri cum militibus eorundem com' capiant assisas in comitatibus illis.*

By which statute, apprentices of the law, with any knight of the county associated to them, may be assigned justices to take assises. *2 Inst. 422.*

By the *st. W. 2. 30. assignentur de cetero duo justiciarii jurati, &c. et associent sibi duos vel unum de discretioribus militibus comitatibus.*

By the stat. of assise, *Rot. Parl.* 21 *Ed.* 1 *Rot.* 3. *Odo assignatur*; two in each circuit. 4 *Inft.* 158.

By the *fl. de finibus levatis*, 27 *Ed.* 1. 4. enquests, &c. shall be taken *coram aliquo iusticiario associato uno milite comitatus illius*.

By the *fl.* of *York*, 12 *Ed.* 2. 3. before one justice of the place, where the plea is, associated with an honest man of the country, knight or other. Coke recites the stat. before a justice of the one place or the other. 2 *Inft.* 422. *F. N. B.* 240. *E.*

By the *fl.* 14 *Ed.* 3. 16. enquests by *nisi prius* may be taken before the justices of *B. R. C. B.* or the *Ch. Baron*; or, if no such go, before the justices of assise, so that one of them be justice of the one bench, or the other, or king's serjeant sworn.

And by this statute, every serjeant may be a justice of assise; for every one is sworn. 2 *Inft.* 422.

So, the king's attorney. 2. *Inft.* 422.

Upon these statutes, patents go annually to the justices of the one bench, or the other, and the barons of the exchequer, to be justices of assise.

And, at the same time, usually a patent to one or more, to be associated with the justices of assise. *F. N. B.* 185. *E.*

And another patent to the justices of assise, to admit those associated. *F. N. B.* 185. *E.*

Another to both, *si non omnes*, &c. that the others may take the assises. *F. N. B.* 186. *A.*

But there cannot be a writ of association, unless the patent to the justice of assise has a clause, *cum his quos tibi associaverimus*. *F. N. B.* 186. *E.*

And after any patent of association allowed, there cannot be another association. *F. N. B.* 186. *D.*

So, a sheriff, or coroner, cannot be a justice of assise, &c. 4 *Inft.* 160.

Nor, by the *fl.* 8 *R.* 2. 2. any in his own country.

Nor, by the *fl.* 33 *H.* 8. 24. in the country where he was born or inhabits, on pain of 10*l.* unless as clerk of assise he be associate, or as mayor, recorder, &c. take assises of fresh force in a borough, &c. or take them in bank, or by adjournment.

By the *fl.* 6 *R.* 2. 5. justices of assise shall hold their sessions in the chief town of every county, where the shire courts are kept. (B. 23.)

By the *fl.* 11 *R.* 2. 11. because this is in part prejudicial, &c. When, and in what place the chancellor, with assent of the justices, may provide remedy, they shall hold their sessions where need is.

By the *fl.* 14 *H.* 6. 3. in times of peace, the assises for the county of *Cumberland* shall be held at *Carlisle*.

By the *fl.* *M. Ch.* 12. they shall be held *semel in anno*.

By the *fl.* *W.* 2. 30. *ter per annum, semel inter quindenam sancti Johannis Baptiste & Gulam Augusti; et iterum inter festum exaltationis sancte Crucis & Octab' sancti Michaelis; & tertio inter festum Epiphanie et festum purificationis beate Marie.*

By the *fl.* 27 *Ed.* 1. 4. *tempore vocationis. Vide 2 Inft.* 423.

By

By the *st. 4 Ed. 3. 2.* they shall take assises at least three times a year, or oftner, if need be.

(B. 24.)
The au-
thority of
justices of
assise.

By the *st. M. Ch. 12.* justices of assise may take assise of *novel disseisin*, and *mort d'ancestor*.

By the *st. W. 2. 30.* assises of *novel disseisin*, *mort d'ancestor*, and attaints.

By the stat. of assise, *Rot. Parl. 21 Ed. 1. Rot. 3.* assises, juries, and certificates of assise.

And so their commission says, *ad omnes assisas juras et certificat coram quibuscunque justic' in prædict com' arrain' capiend'.* 4 *Inft. 158.*

After their patent delivered, the justices of assise send their precept to the sheriff, *quod venire fac. omnia brevia assis', &c. una cum panell' attach' re-attach' sum' resum' & omnibus aliis tangen', &c.*

(B. 25.)
Adjourn-
ment of the
assise.

By the *st. M. Ch. 12. ea quæ in comitatu illo per justiciarios ad assisas capiend' terminari non possunt per eosdem terminentur alibi in itinere suo: et quæ propter difficultatem aliquorum articulorum terminari non possunt referantur ad justiciarios de banco & ibi terminentur.*

And, by equity, they may adjourn before themselves at *Westminster, Serjeants Inn, aut alibi*, out of the circuit. 2 *Inft. 26.*

By the *st. W. 2. 30. adjornent de termino in terminum* upon voucher, essoign, or default of recognitors.

So, in a *mort d'ancestor*, the justices may adjourn in bank upon foreign voucher, essoign, &c.

And by equity, in a certificate of assise. 4 *Co. 4. b.*

So an assise may be adjourned in bank upon any foreign plea, as well as upon a voucher. 2 *Inft. 423.*

So upon demurrer, or other things dubious, before or after verdict. 2 *Inft. 423.*

If an assise be adjourned in bank upon a foreign plea, vouchers, &c. *C. B.* may grant a *nisi prius* for trial in such foreign county, though it has only a delegated power; for it is an incident. 2 *Inft. 423.*

By the *st. W. 2. 30.* After trial of foreign plea, &c. in *C. B. cum per venerit ad captionem assise remittatur loquela cum brevi originali per justiciarios de banco ad priores justiciarios coram quibus capiatur assisa.*

And therefore, the record of assise shall be remanded to the justices of assise to take the assise. 2 *Inft. 423.*

(B. 26.)
Judgment.

The judgment in an assise is, *quod recuperet seisinam* of the tenements in the plaint *per visum recognitorum*

And it may be given by the justices of assise.

So new justices of assise may give judgment upon a verdict found before others; if the record be removed before them by *certiorari*. *F. N. B. 243. D.*

So if an assise be adjourned in bank for difficulty, judgment may be given there. 2 *Leo. 41.*

So after a verdict before justices of assise, it may be removed in *B. R.* and judgment shall be given there; if a new commission

is made before judgment by the justices of assise. *F. N. B. 243. D.*

But where a foreign plea is before justices of assise to part, and it is adjourned for trial in bank, and tried; judgment shall not be given there, but it shall be remanded before the justices of assise, before whom the assise originally depended. *R.*

2 Leo. 41.

If the justices of assise delay judgment, a writ shall go *de procedendo ad iudicium*. *F. N. B. 243. D. F.*

And afterwards an *alias*, & *pluries*, *vel causam nobis significes*. *F. N. B. 243. D.*

And if nothing is done, an attachment. *Dub. F. N. B. 243. D.*

By the *§. 9 Ed. 3. 5*. Justices of assise shall send all their records and processes determined, and put in execution, into the exchequer once a year at *Michaelmas*.

And by the *§. 11 H. 4. 3*. into the treasury every second year, that they may not be altered or impaired.

By the common law, if the matter was not well examined by the verdict before or after judgment, the justices of assise may *ex officio* re-examine the matter by the same recognitors. *2 Inst. 415. F. N. B. 181. A. B. C.* (B. 27.) Certificate of assise. By the common law.

And thereupon a writ goes to the sheriff, to summon the recognitors *ad certificand' eos super articulis*, &c. and that he summon the parties *ad audien' illam certificationem*. *Bo. R. Ab. 216. F. N. B. 181. E.*

So a certificate lies upon an assise of *mort d'ancestor*, *darrein presentment*, *juris utrum*, and an attain. *F. N. B. 183. E.*

But a certificate of assise would not be allowed, where the jury give a full and general verdict. *2 Inst. 415.*

Or where any of the recognitors die. *2 Inst. 415.*

So now by the *§. W. 2. 13 Ed. 1. 25*. A certificate of assise lies where the assise was taken by default, or upon a plea by a bailiff; for the tenant may verify to the justices, that he had matter of record, or in writing, as a release, &c. and pray that it be re-examined. *2 Inst. 414, 415. F. N. B. 181. A. F.* (B. 28.) By statute.

So the tenant may pray a certificate upon a defeazance, as well as a release. *2 Inst. 415.*

Though the deed, &c. be dated in a foreign county. *2 Inst. 415.*

So he may sue a certificate of assise, if he loses by default. *F. N. B. 182. C.*

A certificate of assise may be before or after judgment. *F. N. B. 183. D.*

Before the same justices of assise, or others. *F. N. B. 181. C. E. 182. C.*

If it be before the same justices, they may take it without a new commission, or with one. *F. N. B. 181. D. 182. A.*

So

So it may be in *C. B.* though the land lies in another county, if the assise be removed there. *F. N. B. 183. F.*

So it may be, though all the recognitors are dead, except two. *2 Inst. 415.*

So it may be in *B. R.* or *C. B.* if they are in the county, where the assise passed. *F. N. B. 181. C. 182. C.*

Or at the next assises for the same county. *F. N. B. 182. C.*

But regularly it ought to be in the county, where the former assise was. *2 Inst. 415, 416. F. N. B. 181. C.*

The process shall be summons against the recognitors, and a *venire* against the parties, and afterwards a *distingas*. *F. N. B. 183. G.*

If it be sued before the same justices, the certificate shall issue out of the rolls of the same justices. *F. N. B. 183. B.*

If before other justices, the writ and patent shall issue out of the *chancery*. *F. N. B. 183. C.*

And if the tenant does not appear, it may be taken by default.

If the deed upon which a certificate is prayed be dated in a foreign county, it shall be transmitted into *C. B.* and then to the foreign county to be tried, and afterwards remanded to the county where it was brought. *2 Inst. 415.*

So, if a certificate be sued in another county, than that where the assise was taken, it may be tried by *nisi prius*. *F. N. B. 183. H.*

And upon a certificate of assise a man may have a writ of association, *si non omnes*, &c. *F. N. B. 183. A.*

The judgment in a certificate of assise shall be, *quod tenens restituatur, &c. & recuperet dampna in duplo; & quod querens capiatur*. *F. N. B. 182. A.*

(C) Assise of Mort d'ancestor.

(C. 1.) When it lies.

AN assise of *mort d'ancestor* lies by an heir after an abatement by a stranger in the lands, rents, or other hereditaments, of which his ancestor was seised in fee the day of his death. *F. N. B. 195. C. D.*

And it lies, where the ancestor was disseised the day of his death, though he never died seised; for the writ says only, *si seisitus fuit die quo obiit*. *F. N. B. 195. D. Bro. Cofnage, 1.*

Or if the ancestor was disseised, the day in which he took a voyage upon the sea; where he died out of the realm in a pilgrimage. *F. N. B. 196.*

Or the day of his profession; where he enters into religion. *F. N. B. 196. A.*

So it lies by a younger brother, where the eldest has been absent out of the realm for several years, though he be alive. *F. N. B. 196. L.*

So it lies, though the ancestor was seised by disseisin.

And by the *st. Gloc.* 3. If tenant by the curtesy alien, and do not leave assets; though the mother was not seised *die quo obiit*. *F. N. B.* 196. *E.*

But it does not lie upon the death of any ancestor, except a father, mother, brother, sister, uncle, aunt, nephew, or niece; for upon the death of another ancestor, an *aiel*, *basaiel*, or *cofinage* lies. *F. N. B.* 195. *C.*

It lies only where a stranger abates or disseises; for if it be by a parcener, &c. a *nuper obiit* lies. *F. N. B.* 196. *L.*

It does not lie where the ancestor was seised in tail, remainder to himself in fee; but where he is seised in fee only. *F. N. B.* 196. *K.*

It does not lie for lands deviseable by custom. *F. N. B.* 196. *I.*

(C. 2.) Process.

The process in an assise of *mort d'ancestor* against the tenant, is summons. *F. N. B.* 196. *G.*

And if he make default at the return of the writ, there shall be a re-summons; and if he make default upon that, the assise shall be taken by default. *F. N. B.* 196. *G.*

But at the return, the tenant may call an essoin to save the default.

So at the return of the re-summons, after a discontinuance of the assise of *mort d'ancestor*. 2 *Inst.* 249.

So at the day in bank, where upon the voucher of a foreigner, it is removed out of *Chester* into *C. B.* 2 *Inst.* 249.

Yet by the *st. W.* 1. 42. In *mort d'ancestor*, &c. the tenant cannot assign himself after appearance. 2 *Inst.* 248, 249.

Nor by the *st. W.* 2. 28. the demandant in any case, where the tenant is ousted. 2 *Inst.* 418.

The writ of assise of *mort d'ancestor* requires, *quod recognitores interim videant*, &c. *F. N. B.* 195. *E.*

And it may be against several tenants for several lands, rents, &c. *F. N. B.* 195. *G.*

And if the heir be within age, he shall not find pledges. *F. N. B.* 195. *H.*

But where it is by parceners, where some are of full age, it shall be in the common form. *F. N. B.* 195. *H.*

The order of the parcels shall be the same, as in a writ of right. *F. N. B.* 196. *C.*

The writ may be returnable before justices of assise, or special commissioners, or in *C. B.*

In the count, the demandant must shew, how he is heir.

(C. 3.) Pleas in Mort d'ancestor.

To an assise of *mort d'ancestor* the tenant shall plead in abatement, That the demandant himself was last seised. (C. 3.)

In abatement.
Or,

Or, *that a stranger was.*
Quod non tenet.

(C. 4.)
 In Bar.

The general bar is, *that the ancestor non fuit seifinus die quo obiit.*

So the tenant may plead specially, *a fine or recovery of the ancestor.*

Or *a feoffment*; but then he must traverse the seisin.

So he may plead, *a lease for years from the ancestor to himself.*

That he claims nothing, but as guardian of the demise of the king, of whom the lands are held.

That the demandant is a bastard.

A release; a warranty.

(C. 5.) Taking of the Assise.

The justices of assise may, by their general patent, take an assise of *mort d'ancestor.* *F. N. B. 195. F.*

So there may be a patent of association, *si non omnes*, certificate of assise, &c. as in another assise. *F. N. B. 196. D.*

The recognitors of an assise of *mort d'ancestor*, in all cases where a special bar is not pleaded, ought to enquire of three points, *viz.* 1. Whether the ancestor was seised *die quo obiit.* 2. Whether he died within fifty years. 3. Whether the demandant be the heir. *2 Inst. 399.*

And they ought to enquire of these points, though it be taken by default. *2 Inst. 399.*

Though the tenant pleads in abatement, or vouches, which is counterpleaded, and found for the demandant. *Dy. 311. a. 2 Inst. 399.*

Though the tenant traverse only one of the points. *Dy. 311. 2 Inst. 399.*

And if all the three points are not found for the demandant, he shall not recover, though one or two of the points are found for him. *Dy. 311. a.*

But if the tenant in *mort d'ancestor*, or the tenant by voucher plead a special matter of record, &c. in bar, as a release, collateral warranty, matter of record, &c. if it be found for the demandant, it shall be peremptory to the tenant without an enquiry of the three points. *Dy. 311. a. 2 Inst. 399.*

(D) Aiel, Besaiel, and Cosinage.

IF a stranger abate after the death of the grandfather, or great grandfather, the heir shall not have a *mort d'ancestor*, but a writ of *aiel*, or a writ of *besaiel.* *F. N. B. 221. D.*

If he abate upon the death of the *tresaiel*, or other collateral cousin more remote, he shall have a writ of *cosinage.* *F. N. B. 221. I.*

And

And this was agreed *per magnates regni.* 21 H. 3. Fitz. Co-

fnage 13.

And the writs of *aiel*, *besaiel*, or *cofnage*, lie in the same cases by the heir, if a stranger abate upon the death of his *aiel*, *besaiel*, or *tresaiel*, or cousin more remote, in which a *mort d'ancestor* lies, where the abatement is upon the death of the father, mother, brother, sister, uncle, aunt, nephew, or niece. *F. N. B.* 221.

Cofnage lies in the lineal descent, to the 20th degree, if there are so many. *Fitz. Cofnage* 15.

But *aiel*, *besail*, or *cofnage*, do not lie, where he ought to have a *mort d'ancestor*; for the tenant may plead in abatement, that the father, mother, or brother, &c. was last seised. *F. N. B.* 221.

N. Fitz. Cofnage 1.

So *cofnage* does not lie, where he ought to have an *aiel*, or *besaiel*, or *e contra.* *F. N. B.* 221. *N. Bro. Cofnage* 3.

Or, where he ought to have a *nuper obiit.* *F. N. B.* 221. O.

So *cofnage* does not lie, where resort is made in a collateral line, higher than the brother of the *besail.* *Fitz. Cofnage* 15.

The process is summons and *grand cape* before appearance; and if the tenant make default after appearance, a *petit cape.* *F. N. B.* 221. *F. O.*

And the tenant may plead in abatement, *that another cousin of the demandant was last seised.* *Vide in abatement,* (H. 25, 27.)

So he may plead in bar, *non seistus die quo obiit.* *Rast.* 29. *Bro. Cofnage* 10.

A release of the grandfather, or father, &c. with warranty. *Bro. Cofnage* 6. *Herne's Pleader* 60. 21 Ed. 3. 10.

That the tenant himself, or a stranger, is his heir. *Bro. Cofnage*, 7, 9. 6 Ed. 3. 55. a.

And by the *st. W.* 2. 20. he may plead, *quod petens non est propinquior hares*, generally. 2 *Inst.* 399.

So he may plead, *that the demandant is a bastard.* *Rast.* 29. b.

So he may plead, *non obiit seistus*, generally. *Semb. Rast.* 29. *Non fuit seistus infra 50 annos.* *Her. Pl.* 61.

But if the tenant answers nothing, judgment shall be against him by default, without inquiry of any point of the writ, as in a *mort d'ancestor.* 2 *Inst.* 399.

So if he plead *petens non est hares*, and it be found against the tenant; there shall be a peremptory judgment against him, without inquiry of the other point of the writ. 2 *Inst.* 399, 400.

(E) *Nuper obiit.*

IF the father, grandfather, or other ancestor leave coparceners for his heir, and one or more of them deforce the other; the coparcener deforced shall have a *nuper obiit*, *F. N. B.* 197. A.

And it lies in all cases, where the common ancestor dies seised of lands, or tenements in fee. *Ibid.*

So

So it lies by one heir in gavelkind (as well as by one coparcener) against the others. *F. N. B. 197. C.*

Between sisters of the half blood. *F. N. B. 197. G.*

By an aunt and her niece, or against the sister and her niece. *F. N. B. 197. B. R.*

And if one sister alien her part, it lies against the other. *F. N. B. 197. E.*

So if one coparcener be deforced by the other, and a stranger; it lies against the coparcener deforciant. *F. N. B. 197. C.*

It ought to be brought against all the other coparceners, though some of them have nothing. *F. N. B. 197. K.*

But a *nuper obiit* lies only between privies in blood; and therefore, if one alien all, or part, the other coparcener shall have a *mort d'ancestor* against the alienor. *F. N. B. 197. E.*

Or enfeof B. and afterwards take B. to wife, a *mort d'ancestor* lies against the husband and wife. *F. N. B. 197. M.*

Yet if he retake the estate to himself in fee, for life, &c. a *nuper obiit* lies, if he do not disclaim in blood. *F. N. B. 197. F.*

So it does not lie between coparceners, where the common ancestor does not die seised in fee; for if he was seised in tail, a *formedon* lies; if he was disseised, a writ of right *de rationabili parte*. *F. N. B. 197. A.*

Nor does it lie by a coparcener, who has lands of the same ancestor, unless she puts them in hotch-pot. *F. N. B. 197. O.*

Nor by a villein, though he takes the coparcener to wife. *F. N. B. 197. N.*

The process in a *nuper obiit* shall be summons, *grand cape*, and *petit cape*, as in an *aial*.

The tenant cannot plead several tenancy, or non-tenure, unless he claims by purchase, or disclaims in blood. *F. N. B. 197. F.*

He cannot vouch. *F. N. B. 197. Q.*

The judgment shall be to recover his purparty, but not to hold in severalty.

(F) Re-disseisin and Post-disseisin.

BY the *fl. Mert. 20 H. 3. 3.* If a disseisee recover in an assise of *novel disseisin*, and have seisin and be afterwards disseised by the same disseisor, a writ goes to the sheriff, *quod assumptis secum custodibus placitorum coronæ et aliis militibus in propria personâ accedat ad tenementum, et coram eis per primos juratores et alios vicinos, faciat inquisitionem, &c.*

The writ of *re-disseisin* did not lie by the common law; but by this statute it lies upon a recovery in an assise of *novel disseisin* only. *2 Inst. 82, 83. Vide F. N. B. 188. B.*

And it lies upon a recovery before justices in *eyre*, or of assise, or in *B. R.* or *C. B.* *2 Inst. 83. Co. L. 154. a. F. N. B. 188. D.*

Though the recovery be upon verdict, demurrer, confession, or default. 2 *Inst.* 83. *Co. L.* 154. a. Confirmed by the *st. W.* 2. 26. 2 *Inst.* 416, 417.

If the disseisee after the recovery, has seisin by entry, or *habere facias seisinam*. 2 *Inst.* 83.

So it lies after judgment in a former *re-disseisin*, *toties quoties*. 2 *Inst.* 83. *F. N. B.* 189. D.

And it lies upon a *re-disseisin* of a rent; or any thing for which an assise of *novel disseisin* lies. *Co. L.* 154. a. 2 *Inst.* 82.

If tenants in special tail recover in an assise, and afterwards one dies without issue; a *re-disseisin* lies by the survivor, though he be tenant in tail after possibility. *Ray* 414.

So by the *st. Mert.* 20 *H.* 3. 3. a *post-disseisin* lies *eodem modo* after a recovery in *mort d'ancestor*, or any other real action. 2 *Inst.* 84.

(F. 2.) How they are to be proceeded in.

By the *st. Mert.* 3. The sheriff ought not to prosecute a plaint of *re-disseisin* without the king's writ.

The writ of *re-disseisin*, or *post-disseisin*, is in the nature of a commission to the sheriff to hold plea in such case. *Vide* 2 *Inst.* 82.

After the writ delivered, the sheriff may warn the defendant to attend the inquest.

And the defendant may plead in abatement, jointenancy, &c. 2 *Inst.* 83.

Or in bar, as a release, &c. 2 *Inst.* 83.

If the defendant does not appear, or pleads nothing, the inquest shall be taken.

The sheriff shall be present with two coroners, if there are so many; otherwise one is sufficient. 2 *Inst.* 84.

And therefore, if he return, that he took one coroner only, the other being sick, it is error. *R.* 2 *Bul.* 93.

The inquest shall be two at least of the former jury, with others, if the former recovery was by verdict. 2 *Inst.* 84.

And if all are dead, or only one survives, the *re-disseisin* fails. 2 *Inst.* 84. 2 *Cro.* 335. *Vide F. N. B.* 198. H.

But if the former recovery was upon demurrer, or confession, the inquest shall be only by others *de Vicineto*. 2 *Inst.* 84.

If the defendant be convicted of another disseisin, by the *st. Mert.* 3. he shall be imprisoned till he makes redemption.

By the *st. Marl.* 52 *H.* 3. 8. He shall not be delivered without the king's precept upon a fine paid, and if the sheriff deliver him otherwise, he shall be amerced.

By the *st. W.* 2. 26. *Damna adjudicentur in duplo, nec fit replegiabilis per commune breve*.

And therefore, the sheriff gives judgment, *quod capiatur*, and be detained till delivered *per mandatum domini regis*, &c.

And

And upon this he shall have a *certiorari*, to remove the record into *B. R.* where he shall be fined, and shall thereupon have a writ for his delivery. 2 *Inst.* 115. *F. N. B.* 190. *F.*
Or an *habeas corpus.* *Noy.* 11.

(*F.* 3.) When they do not lie.

But a *re-disseisin*, or *post-disseisin* do not lie upon a recovery without writ; as in an assise of fresh force by the custom of a city or borough. 2 *Inst.* 83.

They lie only, where there is the same plaintiff, of the same tenement, and the same tenant. 2 *Inst.* 84.

Assise of Darrein Presentment.

Vide Quare Impedit, (*C.* 1, &c.)

Assise of Juris Utrum.

Vide Quare Impedit, (*E.*)

Writ of Entry in Nature of an Assise.

Vide Dum fuit infra Ætatem, (*H.*)

Assise of Common.

Vide Common, (*I.*)

Assise for a Nuisance.

Vide Action upon the Case for a Nuisance, (*D.* 1.)

Rent of Assise, and Assise for Rent.

Vide Rent, (*C.* 2.—*D.* 1.)

A S S I S E, A N D A S S A Y.

Assise, and Assay of Ale.

Vide Justices of Peace, (*B.* 94.)

Assise, and Assay of Bread.

Vide Justices of Peace, (*B.* 96.)—*Leet*, (*L.* 8.)

Assise,

Assise, and Assay of Wine.

Vide Justices of Peace, (B. 98.)

A S S I S T A N T S.

Vide Parliament, (D. 18.)

A S S U M P S I T.

Vide Action upon the Case upon Assumpsit.—Pleader, (2 G. 1, &c.)

A S S U R A N C E.

Policy of Assurance.

Vide Merchant, (E. 9, 10.)

A T T A C H M E N T.

(A. 1.) Attachment for Contempt.

AN attachment is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly grantable in cases of contempts, against which all courts of record, but more especially those of *Westminster-hall*, and above all the court of *B. R.* may proceed in a summary manner. 2 *Hawk. Leach*, 213. *Vid. Wils.* 300. *

*(A. 2.) What is a Contempt to ground an Attachment. *

*To use contemptuous words on delivery of declaration in judgment. *Strange*, 567. *

*So to assign the death of plaintiff in ejectment as error; for it is but *pro forma*, and such assignment tends to defeat the proceedings instituted by the court to try the right: So also the release of such plaintiff is a contempt for the same reason. *Str.* 899. *

*So to impose on the court by bringing a fictitious action. *B. H.* 237. *

*So to serve process in sight of the court on a person attending his cause at *nisi prius*. *Andr.* 275. *Str.* 1094. *

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* So

* So to arrest a party attending arbitrators under a rule of court or *nisi prius*. 2 Bl. 1110. *

* So to challenge the array after a special jury had been struck. Str. 593. *

* Otherwise where the challenge is on account of the sheriff's being interested. Id. 1000. *

* So to put in fictitious bail. Str. 384. *

* So it is a contempt in a witness not to attend on a subpoena. Str. 510, 810, 1054. Barnes 33, 35, 36, 497. Ld. Raym. 1528. *

* But the witness must be served in a reasonable time; the service must be personal, and reasonable charges tendered (if the witness is to come from a distance), and the court will not be nice as to the expence, but will only enquire whether his non-attendance be through obstinacy. Str. 1054. B. R. H. 313. Str. 1150. *

* And if the witness attended but too late, and could give no evidence but what another gave, and the party who subpoenaed him had a verdict, the court will not grant an attachment. B. R. H. 180. *

* So service of a subpoena, on a servant, who said he gave it to his master, and that the latter said he would attend, is not sufficient ground for an attachment. B. R. H. 313. *

* If one send a fictitious letter signed, "summoning bailiff," to a special jurymen who has been summoned, informing him that the trial has been put off, when in fact it was not; this is a contempt for which an attachment will go. 3 Bur. 1564. *

* So when there was a rule of court to abide by an award, and not to bring a bill in equity, after the award made, and motion to set it aside but refused, the party paid the money awarded, but afterwards brought a bill in equity; this was held to be a contempt in the party, his attorney and counsellors. 3 Bur. 1256. *

* So an attachment will be granted against an attorney for acting after he has been forejudged, if he has notice of the forejudgment. Barnes 29. Otherwise if no notice. Id. 41. *

* So for putting to process the name of an attorney without his authority. 1 Bur. 651. *

* So for signing a counsel's name to a bill in equity without his consent. Case of *James Thistlethwaite* in the cause of *Fowke v. Garford* in the exchequer. Tr. 29 G. 3. *

* So for inserting defendant's name in a writ after it is sealed. Barnes 31. *

* For altering sheriff's warrant sealed. Id. 199. *

* So it lies against jurors giving verdict by huffling halfpence. Barnes 32. *

* Against a bailiff for extortion. Id. ibid. *

* Against sheriff for not returning a writ. Id. ibid. *

* Against a sheriff for refusing to comply with terms of judgment order. Id. 28. *

*And service on the under-sheriff, or person acting as under-sheriff, or leaving it at his house if he abscond, is sufficient to ground an attachment against the high-sheriff. *Id.* 30, 35, 405.*

*So it lies against the bailiff of a liberty for not returning the sheriff's mandate without *mandavi ballivo*; previous to a peremptory rule. *Id.* 35.*

*So if an information be granted against *A.* on the affidavit of *B.* an attachment lies against a third person who threatens the prosecutor with the danger of his life, and says he will be hanged. *Wilf.* 75. *Vid. Infra.* (A. 3.)*

*So it lies against a peer, for refusing to obey the process of the court; so against a bishop for not returning *fi. fa. de bonis ecclesiasticis* (*Semb. sed vid. Ecclesiastical Persons* (D.) 1 *Wilf.* 332.*

*An attachment goes against an under-sheriff for remitting part of a sentence; as if he do not put the head and hands of a man, sentenced to be set in and upon the pillory, in and through the holes, but let him stand on the platform upright. 2 *Bur.* 692.*

(A. 3.) What not.

But an attachment will not be granted where the offence is not strictly a contempt to the court, nor where there is another remedy unless that remedy be difficult to obtain.

*As where the attorney for the plaintiff prevails with the tenant in possession, to deliver possession of premises pending an ejectment, and after rule for landlords to defend on the refusal of the tenant, the court will not grant an attachment; it is no contempt, but a fraud. *Barnes* 180.*

*So an attachment was refused against a witness who had attended two hours; but went away before he was called, by which the plaintiff was non-suited; for he has remedy given by *st. 5 El.* 49. *Bunb.* 142.*

*But it was afterwards granted in a like case, because the remedy by action was difficult and dangerous. *Ibid.**

*So an attachment will not be granted for not delivering up writings on a judge's order, if there be no demand after it is made a rule of court. *Barnes* 27.*

*Nor against a witness for not producing a will according to notice in the *subpœna*, if no rule be made for it. *Id.* 28.*

*Nor against high bailiff for not bringing in the body of a prisoner for a crime, who is charged with action and escapes, the keeper giving no security to the bailiff. *Id.* 34.*

*Nor against a gaoler for a voluntary escape, but an information. *Str.* 532.*

(A. 4.) Manner of Proceeding.

Application is generally made on affidavit for a rule to shew cause and answer the matters of the affidavit.

*But sometimes it may be granted absolute in the first instance, as where defendant treated the process of the court contemptuously; and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the court sent for the sheriff into court, and ordered him to take a sufficient force. *Str.* 185.*

*So it may be absolute in the first instance, if there be more than one affidavit. *Id.* 1068.*

*But the court will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded, are sworn before the agents of the prosecutor. *3 Term Rep.* 351, 403.*

*Motions and affidavits for attachments in civil suits are proceedings on the civil side of the court of *B. R.* until the attachments issue, and are to be entitled with the names of the parties. As soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *3 Term Rep.* 253.*

*On the rule being made absolute, the party must appear, and enter into a recognizance, to answer interrogatories, and is then sworn to make true answer to them: He cannot acknowledge the contempt, and submit to the judgment of the court, especially if the offence be complicated, for there is nothing to which he can plead guilty, till interrogatories be filed; nor is he considered as in contempt till he be so reported. *2 Bur.* 792. *4 Bur.* 2105.*

*Unless in the case of a rescue, or contempt in the face of the court. *1 Black. Rep.* 649.*

*If no interrogatories be filed within four days after the recognizance, it may be discharged on motion; yet if the party do not make such motion, and the interrogatories be exhibited after the four days, the court will compel him to answer them. *2 Hawk. Leach,* 214.*

*After examination, application is made to the court, to have the interrogatories with answers referred to the proper officer to make his report. When the officer is ready, counsel moves that he may report. If he report that the party is in contempt, he may either be committed, or by consent be continued on his recognizance to a future day, and then sentence pronounced. *2 Bur.* 792. *3 Bur.* 1256.*

*But if the party fully purge himself upon oath, in his answer to the interrogatories, of the whole matter charged upon him, the court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he think fit. *2 Hawk. Leach,* 214.*

*But if he confess part of the contempts in his answer, and deny others, the court will not discharge him from the contempt so denied, but will proceed farther to examine the truth of them. *Id. & Barnes* 258.*

*But he is not obliged to answer an interrogatory that may convict him of another offence. *Str.* 444.*

*If the defendant has in the course of the proceeding paid very severe costs, and the court be unwilling to punish him further, yet unwilling

unwilling to have slight sentence on record for an obstinate contempt, they may waive giving judgment for the contempt, and order his recognizance to be discharged. 3 Bur. 1256. *

* (B) Attachment for Non-payment of Costs, &c. *

* Attachment for non-payment of costs, and for not performing an award, is in the nature of a civil execution. 1 Term Rep. 266. *

* (C) When Attachment may be moved for. *

* An attachment for non-payment of costs, or not returning a writ, may be moved for the last day of term: but no other. 1 Bur. 651.

Attachment in Process.

Vide in Process, (D. 6.—E. 2.)—*Attorney*, (B. 13, 15.)

Attachment in Chancery.

Vide in Chancery, (D. 3, 4.)

Attachment of Privilege.

Vide Attorney, (B. 19.)

(A) Foreign Attachment; how it shall be prosecuted.

BY the custom of *London*, if a plaint be entered in the court of the mayor, or the sheriff against *A.* and the process be returned *nichil*, and thereupon the plaintiff suggests, that another person within *London* is indebted to *A.* the debtor shall be warned, and if he does not deny himself to be indebted to *A.* the debt shall be attached in his hands. 22 Ed. 4. 30. *Vide London*, (N. 1.)

The plaint may be exhibited in the mayor's court, or sheriff's court.

But the proceeding in the mayor's court is more expeditious, less expensive, and of greater advantage.

The plaintiff finds pledges to prosecute his plaint.

And process issues by a summons, directed to the serjeant at law to summon the defendant, who makes return, *quoad defendens nichil habet per quod sum' potest.* 22 Ed. 4. 30.

Then upon a suggestion entered, that *A.* is indebted to the defendant, a precept goes to the serjeant to attach the money in the hands of *A.* *Lut* 981.

And

And if the defendant afterwards makes four several defaults at four several days to him given, a *scire facias* issues against the garnishee; and if he acknowledges the debt due from him to the defendant, and the plaintiff swears his debt from the defendant, and finds pledges to return the money attached, if the defendant disprove the original debt within a year and a day; the plaintiff shall have judgment and execution for the money in the hands of A. and shall acknowledge satisfaction for them upon record.

[But the defendant must be summoned or have notice; otherwise judgment against the garnishee will be erroneous; and the money paid or levied in execution on it will not discharge the debt from the garnishee to the defendant, (though it was alledged that the custom of the city court is to give no notice.) *Fylber v. Lane*, T. 12 G. 3. 3 *Wils.* 297. * [2 *Bl. Rep.* 834].—*Vid.* 1 *Ld. Raym.* 727.*

In the mayor's court, the charge of an attachment in his own hands is but 10s. in the hands of another 15s. *Priv. Lond.* 190.

And if there be no opposition, it may be finished in five days. *Ibid.*

And if there be an opposition, and a trial thereupon, it may be for 30s. *Priv. Lond.* 192.

And an attachment there continues in force always, and the plaintiff may proceed there when he will. *Priv. Lond.* 189.

But an attachment in the sheriff's court is a third part more chargeable, and cannot be determined under three weeks, though there be no opposition; nor continues in force above 16 weeks. *Pr. Lond.* 189, 191.

And it may be removed by a *levetur querela* signed by the mayor or recorder, into the mayor's court for 5s. 10d. *Pr. Lond.* 191.

If the garnishee does not appear upon the *scire facias*, there shall be judgment against him upon his default.

And the plaintiff ought to swear to his debt in person, and not by attorney. *R. Lut.* 985. *R. Jon.* 406. *R. i Rol.* 554. l. 10.

So there is a custom of foreign attachment in *Exeter* and other places. 1 *Leo.* 321. *Cont.* 1 *Rol.* 550. l. ult.

(B) By whom it may be made.

IN every plaint affirmed against any man, there may be an attachment. 22 *Ed.* 4. 30. b.

Though the plaintiff be a foreigner, if the others are citizens. *Dub. Dy.* 196. b. *vide Lut.* 984.

Though the plaint be only for goods in the *detinet*; if he avers the value of the goods upon record. 1 *Rol.* 554. l. 2.

If the plaint be against an executor or administrator, and the testator was indebted to the plaintiff only by simple contract; yet the plaintiff may attach money due to the testator in the hands of another within *London*; for a debt on simple contract is recoverable against an executor in *London*, though not by the common law. 1 *Rol.* 105. *Dub. Dy.* 196. b. **Vide* 3 *Wils.* 297. 2 *Bl. Rep.* 834.*

If a man sue for a debt in *C. B.* pending this suit he may affirm his plaint in *London* for the same debt, and make an attachment of a debt due from another to the defendant. *R. Cro. El.* 593, 1713.

But, upon a plaint against the ordinary, a debt due to the intestate cannot be attached; for the reason of a foreign attachment is to avoid a circuity of action; for if the plaintiff recover against the garnishee, he avoids the suit, which, upon a recovery by the plaintiff against the defendant, the defendant might have against the garnishee; but, upon a recovery against the ordinary, he cannot have an action against the garnishee. *R. inter Masters & Lewis, Mic.* 7 *W.* 3. *B. R.* 5 *Mod.* 75, 93. *Skin.* 516. (1 *Ld. Ray.* 56.) *R. Dy.* 247. a. 1 *Rol.* 551. l. 5.

So, upon a plaint in the *detinet* for goods, there shall be no attachment, without an averment of the value of the goods upon record; for it does not appear to what value there ought to be satisfaction. *R. 1 Rol.* 553. l. 50.

(C) What Goods may be attached.

A MAN may attach money, or goods, in the hands of the garnishee.

And jewels.

So chests and boxes locked, and upon a day after four several defaults, the court will give judgment, that they be opened.

So he may attach money due from the garnishee upon bond. 1 *Rol.* 551. l. 50.

Or, upon a bill of exchange, or a goldsmith's note. *Carth.* 26.

And money due upon a bond, or contract, may be attached before the day of payment; but there shall not be execution till a payment incurred. *R. 3 Leo.* 236. *Vide Cro. El.* 184, 713. *R. 1 Sid.* 327. *R. 1 Rol.* 553. l. 10, 35.

So, if money is due upon an account, and there be a promise to pay at a future day; it may be attached before the day. *Semb. 1 Rol.* 105.

So, if money be due to *A.* who dies, and the debtor promises, upon forbearance, to pay to his executor or administrator; it may be attached by a creditor of *A.* *R. 1 Rol.* 105. 1 *Rol.* 551. l. 50.

So if goods come to the hands of the garnishee, after an attachment granted in the mayor's court, they may be attached. *Semb. Priv. Lond.* 197.

So a man may attach goods or money, which he himself owes to the defendant. *Adm. Cro. El.* 186. *Cont. Dy.* 196. b. in marg.

*marg. Dub. 1 Brownl. 60. R. 1 Rol. 554. l. 15. * Vide 3 Wilf. 297.**

And goods or money due to a testator or intestate, in the hands of the executor or administrator. *1 Rol. 554. l. 20.*

So money in the hands of an attorney; for he shall not have his privilege against a foreign attachment. *R. 1 Sand. 67, 68. 1 Sid. 362. cont. 2 Leo. 156. Dy. 287. a. in marg.*

So money may be attached, though an original bears *teste* before, in order to sue for it in *B. R.* or *C. B.* unless it was returned before the attachment. *1 Rol. 552. l. 47. 1 Sal. 280. * Vide 1 Ld. Raym. 727.**

So money, which was not due from the garnishee when the plaint was levied, if it become payable before process against the garnishee. *R. 1 Rol. 553. l. 25.*

There may be an attachment for part of a debt.

If there be an attachment for debt upon a bond, the penalty shall be attached; but the court gives judgment only for the principal. *Cro. El. 101. 1 Sid. 327.*

If goods are attached, there shall be judgment for an appraise-ment, and a precept to the officer to appraise.

If the officer return *elongavit*, at the next court a jury shall be summoned to inquire of the value, and there shall be judgment for the value found.

(D) What not.

BUT goods cannot be attached by the custom of *London*, unless it be suggested, that the garnishee is a man within the city. *Semb. by certificate of the recorder, 22 Ed. 4. 30. b. R. 1 Rol. 554. l. 25.*

So, if the debt does not arise within the jurisdiction. *R. 3 Lev. 23.*

So a prohibition lies upon an attachment of a debt out of the jurisdiction. *Dub. Sho. 10.*

And it ought to be averred, that the parties are within the jurisdiction of the court. *Lut. 984. Lat. 208. Priv. Lond. 213.*

So a debt due to an intestate cannot be attached upon a plaint against the administrator, though he be sued as administrator; unless he be sued for a debt due by his intestate. *R. Cro. El. 843.*

So a debt due upon record by recovery, or otherwise, cannot be attached. *R. Cro. El. 63, 186. 1 Rol. 105. R. 1 Leo. 29. R. 3 Leo. 240. Dy. 247. a. in marg. R. 1 Rol. 552. l. 35.*

Nor, money levied in execution by the sheriff upon a *fieri facias*. *R. 1 Leo. 30, 264.*

Nor, a debt due upon a statute or recognizance. *1 Leo. 30.*

* Nor trust money in the hands of the garnishee. *Semb. Dougl. 380.**

So there cannot be an attachment of a debt, for which a suit is commenced in a superior court. *1 Rol. 552. l. 45, 40.*

So

So there cannot be an attachment for a debt after a suit commenced for it in *B. R.* or *C. B.* *Semb. Cro. El.* 101. *R. Cro. El.* 157. 3 *Leo.* 210.

Or, in other superior court.

Nor, after an original filed, though there be no appearance upon it. *R. Cro. El.* 691.

Though the original be not returnable.

Otherwise, if the original was not actually purchased before the plaint affirmed, though it bears *teste* before. * *Vide* 1 *Ld. Raym.* 727.*

So there cannot be an attachment for a debt before it be due: as, if *A.* be indebted in a sum to be paid at *Michaelmas*, a debt due from another to *A.* cannot be attached before *Michaelmas*. *R. Cro. El.* 184. *R. Cro. El.* 713. but there said, that the usage was otherwise; but the case seems misreported. *Vide* this explained. 3 *Leo.* 236. *Lut.* 984. 1 *Rol.* 553. l. 5.

Though the judgment in the attachment be not till after *Michaelmas*. *Cro. El.* 184.

So in an attachment, there cannot be judgment for the recovery of a debt before it be due. *R. Jon.* 406.

Yet it seems, that in the mayor's court a suit may be commenced for an attachment of a debt, before the day of payment. *R. Jon.* 406.

So, there shall be no attachment, for the debt of a testator, of goods or money in the hands of the executor; unless they were due to the testator *tempore mortis*, though they are assets in his hands: as, if an executor sell the goods of the testator, the money cannot be attached in the hands of the executor. 1 *Vent.* 113.

If he takes a bond for a debt due to the testator; the money due upon the bond cannot be attached. 1 *Vent.* 113.

If an executor recovers damages in trespass, covenant, &c. for the goods of the testator, or a covenant to him; the money recovered cannot be attached. 1 *Vent.* 112.

So, if money be awarded to an executor upon a submission by him of controversies between his testator and another person; the money due by the award cannot be attached. *R.* 1 *Vent.* 112, 113. 1 *Lev.* 306.

If *B.* be bound by contract to pay two-pence for all goods sold before *August*; this, which rests only in damages, cannot be attached. *R.* 1 *Rol.* 552. l. 20.

So, by the *st.* 9 *W.* 3. 44. *sec.* 74. Stock in the *East-India Company*, by that act erected, shall not be subject to foreign attachment.

So there shall not be any attachment of goods delivered to a carrier, he being privileged in *C. B.* 1 *Leo.* 189.

Nor, of goods, of which the garnishee has no property at the time. 1 *Rol.* 551. l. 35.

Nor, for rent. *Priv. Lond.* 203.

Nor, for goods taken by trespass. *Priv. Lond.* 203, 204. 1 *Rol.* 551. l. 37.

Nor,

Nor, of a legacy. *Ch. Ca.* 257. for creditors have an interest in it, who cannot be warned. *R.* 1 *Rol.* 551. l. 45.

Nor, of corn out of sacks. *R. Cro. El.* 230. But this seems to be an attachment in process. 3 *Leo.* 236.

So there shall be no attachment upon a plaint in the *detinet*, unless the value of the goods demanded be averred; for it does not appear to what value the attachment ought to be. *Priv. Lond.* 213. 1 *Rol.* 553. l. 50.

(E) How the Garnishee shall be aided.

IF there be an attachment for money in the hands of *A.* upon the return of the *scire facias*, *A.* may make an attorney and plead.

Or he may wage his law; except where the plaintiff by two witnesses proves, that he had goods in his hands.

If he plead *nil debet*, it is sufficient, without saying, that he has no goods in his hands due to the defendant. *R. Cro. El.* 172. And it was *R. acc.* in the same case. 1 *Leo.* 321.

If the day of payment by the garnishee be not incurred, he may plead it. *Priv. Lond.* 198.

So, if an horse be attached in the hands of an hostler; he may plead, that so much is due for hay, &c. *Priv. Lond.* 208.

If the garnishee appear and plead, he must give bail or pledges before the second court after the *scire facias*; otherwise judgment shall be against him for the whole debt.

If he gives bail, it may be tried within four court days after the *scire facias* returned.

* So, the garnishee may plead that the cause of action did not arise within the jurisdiction. 1 *Ld. Raym.* 347. *

But a plea by a garnishee to the jurisdiction of the court shall not be allowed, when he inhabits within *London*. *Carth.* 26.

So, if *A.* appear and give a rule, that the plaintiff do declare upon the attachment, and he does not declare within three days; the attachment shall be discharged.

So, if the defendant at any time appear, and give bail to the original action, the attachment shall be discharged. *Vide Carth.* 26.

Though the bail be given after judgment, or execution against the garnishee; if satisfaction be not entered upon the record.

So, if the defendant surrender himself at any time before satisfaction acknowledged.

So, if *A.* to whom the debt due from the garnishee is assigned, at any time before satisfaction acknowledged, give bail to the original action; all proceedings in the attachment are thereby determined; but if *A.* upon bringing an *habeas corpus* put in bail, he and his bail remain security for all that is recovered of the defendant. 2 *Jon.* 223.

Though the bail given by *A.* to the original action be after trial, and judgment against the garnishee. 2 *Jon.* 222.

And

And such bail may be given in the absence of the defendant.
2 *Jon.* 223.

So if there be judgment for recovery against the garnishee, but no execution; the plaintiff may afterwards sue his debtor, and he shall sue the garnishee. *R. 1 Rol.* 555. l. 5.

(F) How the Defendant himself.

THE plaintiff ought to give security to return the money attached, if the defendant disprove his debt within a year and a day. 1 *Brownl.* 60.

And this year and day commences after the execution, and not after the judgment in the attachment. *R. Cro. El.* 713.

And it ought to be alledged, that such conditional judgment was given. *Semb. Lutw.* 994.

And that the surety was found upon the day of the fourth default. *R. Mo.* 570.

So, if there be an action of debt, and the defendant pleads, that the plaintiff was indebted to him in so much, and he entered a plaint in London, and attached the same debt in his own hands; the plaintiff may reply, that he was not indebted to the defendant; for though the plaintiff had a year and day to disprove his debt, yet if he does not make a difraternation of his debt according to the custom, he may traverse in this action, and shall not be barred by the attachment, if nothing was due. *R. Cro. El.* 598, 830. 1 *Rol.* 551. l. 25.

So he may by his replication shew any other matter of fact, which proves that the plaintiff in the attachment ought not to recover: as, that there were *bona notabilia*, where the plaintiff makes a plaint as administrator upon a grant by the bishop of the diocese. *Semb. Lut.* 993, 994.

(G) What the Judgment shall be.

THE judgment in a foreign attachment ought to be, that the garnishee shall be acquitted against the defendant; for to say, that the plaintiff do recover against him, without more, is not sufficient. 22 *Ed.* 4. 30. b. *R. Cro. El.* 172. 1 *Leo.* 321.

And before judgment, the value of the goods must be found, *R. Jon.* 406.

But the plaintiff in a foreign attachment shall not recover costs against the garnishee. *R. Cro. El.* 172. 1 *Leo.* 321.

Goods attached ought not to be delivered to the party till judgment. *Cro. El.* 230.

(H) When Foreign Attachment shall be pleaded.

IF the garnishee be sued after a recovery against him by attachment in London, he may afterwards plead in bar, the recovery by foreign attachment. 24 *Ed.* 4. 30. l. 1. *Rol.* 551. l. 23.

Though

Though the principal only was paid upon the attachment, and the bond was forfeited. *R. 1 Sid. 327.*

Though the action against the garnishee be founded upon a new promise for payment of the debt, and not for the debt: as, in *assumpsit* by an executor against *A.* upon a promise of payment on forbearance of the debt of his testator, *A.* shall plead a recovery of it by attachment in an action for a debt due from the testator. *R. 1 Rol. 105. Priv. Lond. 200.*

Though an action upon the case be brought against the garnishee; for the plaintiff shall not prejudice the garnishee by changing his action. *R. 1. Rol. 552. l. 5.*

Otherwise, if the thing for which the action is brought, lies only in damages, and no other action but an action upon the case can be brought for it. *Priv. Lond. 204.*

And if part of a debt be attached, it may be pleaded in bar *pro tanto.* *1 Sid. 327.*

So, if there be a recovery before plea, though after an action commenced, it may be pleaded in bar. *1 Sal. 280.*

And in abatement, if the goods are attached before the writ purchased. *1 Sal. 280.*

A judgment in attachment is no bar, unless it be executed. *R. Dy. 82. b.*

An attachment in a plaint against the bishop, will not be a bar in an action by an administrator. *R. 2 Jon. 166. 1 Rol. 551. l. 10.*

Vide Pleader. (2 G. 5.)

(I) How it shall be pleaded.

IF a man pleads a foreign attachment, he must shew the proceedings at large. *3 Keb. 627.*

And must shew, that the custom was strictly pursued. *Lut. 994.*

As, that the plaint was affirmed, prout, &c.

That the plaintiff himself swore to his debt. R. Lut. 985.

That pledges were found to return the money attached, if the original debt be disproved within a year and a day. Dy. 196. b. Lut. 994. R. 1 Brownl. 60.

That upon default at the fourth court a scire facias issued against the garnishee; for it is not sufficient to say, that it was at a subsequent court. R. 1 Rol. 555. l. 15.

If an attachment be pleaded of a debt, before it be payable, he must alledge a special custom for it; for it is not sufficient to alledge the custom of an attachment generally. *1 Rol. 553. l. 15.*

So the plea must shew, *that the money attached was parcel of the debt now demanded. R. Cro. El. 691.*

If the plaint was against an administrator for a debt of his intestate, the custom ought to be alledged, *that if the plaintiff was indebted to the intestate, and the intestate to the plaintiff, by an action by*

by the plaintiff against the administrator, this debt might be attached in the hands of the plaintiff. *R. Cro. El.* 843.

So the plea of foreign attachment ought to conclude with an averment, *et hoc paratus, &c.* *R. Jon.* 406.

But it is sufficient, that the plaint was affirmed for a debt, without an averment, that the debt arose within the jurisdiction of the court. *R. 1 Vent.* 236.

Without shewing the cause of the debt. *Semb. Lut.* 208.

And error in a judgment in *London* does not vitiate the bar. *R. 2 Jon.* 166.

So upon *non assumpsit* the defendant may give in evidence a recovery by foreign attachment. *Lut.* 995. Where the recovery was before the action commenced. *1 Sal.* 280. * *1 Ld. Raym.* 180.*

Otherwise, in debt upon bond. *Semb. Lut.* 995.

ATTAINDER.

Vide Abatement, (E. 3.)—Capacity, (D. 6.)—Discent, (C. 13.)—Dower, (F. 1.)—Parliament, (H. 6.)

ATTAIN T.

(A) When it lies.

AN attain lies, where a false verdict is given in a court of record, in a plea real or personal, sued by writ or bill, if the debt or damages exceed 40s. *F. N. B.* 105. *G. Co. L.* 294. b. By the *fl.* 34 *Ed.* 3. 7.

By the *fl.* *W.* 1. 38. (which was the first statute concerning an attain) a man shall have an attain in a plea of land of freehold, or that concerns freehold: for it was doubted, whether it should be granted without petition to the king upon a verdict in a real action, because he had an action of an higher nature, but the statute is only in affirmance of the common law. *2 Infl.* 237, 130.

By the *fl.* 1 *Ed.* 3. 6. it shall be granted as well on the principal, as the damages in trespasss, without speaking to the king.

By the *fl.* 5 *Ed.* 3. 7. In trespasss with or without writ in a court of record, where the damages pass 40s.

By the *fl.* 28 *Ed.* 3. 8. In a bill or writ of trespasss, without regard to the quantity of the damages.

By the *fl.* 23 *H.* 8. 3. Upon a false verdict between party and party in any suit before justices of record, where the thing in demand and verdict extends to 40l. and concerns not the jeopardy of a man's life, the party grieved shall have a writ of attain against every party giving such verdict, and against the party that shall have judgment on the same.

And

And the value shall be computed according to the thing in demand, not according to the point, upon which the verdict was given. *R. Dal. 32.*

So an attaint lies, if the damages found are excessive. *F. N. B. 105.*

Though the damages are not paid. *Vide fl. 1 Ed. 3. 6. F. N. B. 105. M. 107. G. 1 Leo. 279.*

Though the issue be upon a collateral point. *R. 10 Co. 119. R. 1 Rol. 280. l. 37.*

So an attaint lies, though every word of the verdict is true, if the verdict finds a thing different from the plaint: as, if a man makes title to a *common appendant*, rent as a forester, &c. and the jury find that he had common, rent, &c. the time when, &c. for this is true, if he has a common, &c. *in gross. F. N. B. 106. H. 107. A.*

So an attaint lies upon a verdict in a collateral point in an attaint, or in a writ of right. *1 Rol. 280. l. 32, 35.*

If it finds against a deed, where the witnesses are joined with the jury. *1 Rol. 280. l. 51.*

If the party be acquitted upon an indictment, an attaint lies by the king. *1 Rol. 281. l. 5. Dub. Vau. 146.*

In an action by a *qui tam*, &c. If the defendant be condemned, an attaint lies. *R. 4 Leo. 46.*

So an attaint lies, if a false verdict be given at *nisi prius. F. N. B. 105. N.*

Or, in a court of a city, liberty, or town corporate. *F. N. B. 105. O. 106. B.*

An attaint lies by the king, as well as by a common person. *F. N. B. 107. D.*

By a vouchee, tenant by receipt, or upon *aid prier. F. N. B. 108. A.*

So, by him in reversion or remainder; by the *fl. 23 H. 8. 3.*

And by the *9 R. 2. 3.* by him in reversion, during the life of the tenant for life. *F. N. B. 108. A.*

So it lies by the heir, to whom the land ought to descend, upon which the false verdict was given. *1 Leo. 261.*

So it lies against a party to the first verdict or his heir or executor. *R. Dy. 201. b. Mo. 17.*

(B) When not.

BUT an attaint does not lie upon an inquest of office: as, upon a verdict in a writ of inquiry. *10 Co. 119. a.*

Though it be an inquiry of waste. *F. N. B. 107. C. Co. L. 355. b. Semb. Mo. 184. Cont. 1 Rol. 280. l. 19.*

Nor, upon a verdict in a *redisseisin* before the sheriff and coroners. *Dub. Mo. 184. Cont. 1 Rol. 280. l. 22.*

Nor, upon a writ of inquiry after judgment in a *quare impedit* by default. *11 H. 4. 80. b. 1 Rol. 280. l. 41.* For the four points are only found *ex officio. D. 10 Co. 119. Cont. 1 Rol. 289. l. 45.*

So

So an attain does not lie for a falsity in a verdict, in a point not material to the issue, nor part of the charge of the jury. *Co. 13. Hob. 53.*

As, if the jury who try the counterplea of the receipt of him in reversion, find damages against the tenant. *1 Rol. 280.*

l. 15.

If the jury do not find a thing in another country. *1 Rol. 281.*

l. 17.

If issue be joined upon an immaterial point, upon which there ought to be a repleader. *Semb. 1 Leo. 279.*

So it does not lie upon a verdict for the king, in an indictment for felony, or trespass; for the party is found guilty in effect by 24. *1 Rol. 280. l. 2. 7.*

So it does not lie upon a verdict in an appeal of murder, felony, or mayhem. *F. N. B. 107. L.*

So it does not lie in an action by the king himself; if it be found for the king. *4 Leo. 46.*

So it does not lie, if the damages are too small. *F. N. B. 107. I.*

So it does not lie for excessive damages, where the plaintiff releases the damages. *F. N. B. 107. B.*

So, if the jury find costs, where they ought not. *1 Rol. 281. l. 16.*

So it does not lie, where process goes against witnesses to a deed, and the verdict affirms the deed. *F. N. B. 106. H. 1 Rol. 280. l. 47.*

So it does not lie upon a verdict in a real action, before execution sued. *F. N. B. 107. G.*

Nor, upon a verdict found by 24: as, upon a verdict in an attain. *1 Rol. 280. l. 27.*

Upon a verdict by the grand assise in a writ of right upon the mere right. *1 Rol. 280. l. 34.*

(C) The Proceeding in an Attaint.

(C. 1.) Original.

THE writ of attain must be returnable in *B. R.* or *C. B.* and not elsewhere. *Co. L. 294. b.*

And therefore, conuzance cannot be demanded in an attain. *Ibid.*

And it may be sued out of *chancery*, or out of *B. R.* or *C. B.* in which the record remains, upon which the verdict was given. *F. N. B. 107. O.*

If the verdict was in *C. B.* and the record is afterwards removed into *B. R.* the attain may be sued there. *F. N. B. 107. M.*

So by the *st. W. 2. 13 Ed. 1. 30.* justices of assise might take attain: but this is altered by the *st. 23 H. 8. 3.*

And there may be a special patent to them to take them, and a writ of association, *si non omnes*, &c. as, in an assise. *F. N. B. 108. K. L. 109. H.*

So,

So, by the *stat.* 11 *H.* 7. 21. and 23 *H.* 8. 3. an attain may be sued in the hustings, upon a false verdict in the courts of London.

The writ requires the sheriff *quod summoveat 24 milites de vicineto de B. &c. sacramento recognoscere si juratores per quos, &c. falsum fecerunt sacramentum, &c.* *F. N. B.* 105. *H.*

And takes notice, whether the verdict was at *nisi prius*, in a town court, &c. *F. N. B.* 106. *B.*

Whether it was upon voucher, receipt, or *aide prier*. *F. N. B.* 106. *E. F.*

So mention is made of a re-attachment, where it is brought by the plaintiff in an assise, which was discontinued. *F. N. B.* 106. *F.*

Of garnishment, where it is brought against a garnishee. *F. N. B.* 106. *G.*

If an attain be sued, where the defendant is condemned for the debt or damages, he shall have a writ to bail him till the attain determined. *F. N. B.* 106. *D.*

(C. 2.) Process.

By the *stat.* 23 *H.* 8. 3. the process in an attain shall be summons, resummons, and distress infinite against the party and petit jury, and also against the grand jury.

The distress shall have 15 days between the *teste* and return, and be made on the land of the juror.

And the same days shall be given in the said process, as in dower and no essoin or protection allowed.

(C. 3.) Assignment.

At the return of the writ of attain, by the *stat.* 23 *H.* 8. 3. if any of the petit jury appear, the plaintiff shall assign the false *serment* of the verdict untruly given.

And by the same statute, if the defendant, or any of the petit jury appear not on distress, the grand inquest shall be taken by default.

And the defendant may be essoined once before appearance, but not after.

But the assignment need not mention the value of the thing in demand, for which the verdict was given; for that appears by the first record. *Dal.* 32.

(C. 4.) Plea.

If the defendant, or the petit jury appear, they may appear by attorney. *Vide the stat.* 23 *H.* 8. 3.

And demand *oyer* of the writ, and the record upon which it is founded.

And if there be a variance, it may be pleaded in abatement.

So,

So, non-tenure, in an attaint brought by the tenant in an assise.

Per 2 J. Dal. 3.

Yet by the *ft. 23 H. 8. 3.* outlawry, or excommunication of the plaintiff shall be no plea.

Nor, the death of the defendant, or any of the petit jury, if two survive.

Yet if the defendant dies, the attaint fails generally. *Dy. 5. a.*

But by the *ft. 23 H. 8. 3.* if the writ, process, return, and assignment of false oath be good, and if the plaintiff hath not been nonsuited, or discontinued, or had judgment in an attaint for the same verdict, the petit jury can plead only *non dederunt falsum sacramentum.*

And the party shall plead, *that they gave a true verdict*, or any other matter, that is a bar to the attaint.

So the defendant may plead a release of the land, &c. but this shall not be tried till the plea of the petit jury be determined.

Dy. 201. b.

So any of the petit jury may plead a release to them, *puis darreign continuance.* *R. Dy. 201. b.*

(C. 5.) Nisi Prius.

In an attaint, by the *ft. 5 Ed. 3. 6.* *nisi prius* may be granted. *Vide the ft. 23 H. 8. 3.*

And if the defendant, or any of the petit jury do not appear upon the *distingas*, by the *ft. 23 H. 8. 3.* the grand inquest shall be taken by default.

And if any of the grand inquest or *tales* make default, he shall forfeit 2*s.* for the first default, 4*s.* for the second, and 5*s.* for every subsequent default.

Nothing shall be given in evidence to the grand jury, but what was given in evidence to the petit jury. *1 Rol. 285. l. 30.*

But the defendant may give other evidence to support the verdict, and then the plaintiff shall have an answer to it.

So a *retraxit*, or a nonsuit in an attaint shall be peremptory. *F. N. B. 108. D.*

(C. 6.) Judgment.

By the common law, the judgment in an attaint was, *quod amittant liberam legem, forisfaciant bona & catalla, quod terra & tenementa in manus regis capiantur, uxores & liberi ejicerentur, domus prostrantur, arbores extirpentur, prata arentur, et corpora sua carceri mancipentur.* *Co. L. 294. b.*

By the *ft. 23 H. 8. 3.* the petit jury, if attainted, shall forfeit 2*s.* a moiety to the king, and a moiety to the party, and shall make fine according to their several sufficiencies, shall never be in credence, nor their oath accepted in any court; if the verdict extend to a thing of 40*l.* value. And the party shall have judgment to be restored to all he lost with his costs and damages.

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But if the verdict be under 40*l.* the petit jury shall forfeit 5*l.* only, a moiety to the king, and a moiety to the party, and make fine and ransom at the discretion of the justices.

And execution may be for the part of the king, or the plaintiff, by *capias ad satisfaciendum, fieri facias, or elegit*, or by action of debt.

A T T O R N M E N T.

(A) When necessary.

AN attornment is an agreement of the tenant to a grant of a feignory, rent, or manor, or of the donee or lessee, to a grant of the reversion, or remainder. *Co. L. 309. a.*

For if a man seised of a manor, part in demesne, part in service, alien the manor, all the tenants of the manor, except tenants at will, must attorn to the purchaser; otherwise their services do not pass. *Lit. Sect. 553.*

So, if the lord grant the services of any tenant in particular to another, in fee, in tail, for life, or for years, if the tenant do not attorn, the grant will be void. *Lit. Sect. 551.*

So, if a man grant a rent-charge, or a rent-sock over to another, the terre-tenant, who has the freehold, must attorn to the grant. *Lit. Sect. 556.*

Or, if there be a grant out of a reversion, he in the reversion of the land charged, must attorn to the assignment of the rent-charge. *Co. L. 311. b.*

So, if a man, seised of a reversion, or remainder after a gift in tail, or a lease for life or years, grant his reversion, or remainder by deed; if the donee, or lessee do not attorn, the grant will be void. *Lit. Sect. 567, 568, 569.*

Though he grant the reversion only for years, where it passes as a reversion, and not as a future term. *R. 3 Leo. 17.*

An attornment is necessary in all conveyances of a manor, services, remainder, or reversion, which operate by the common law. *Co. L. 309. b.*

Though the grant or conveyance be by fine; for though by the fine, the estate is executed without attornment, yet there wants a privity to distrain, to have debt for rent, waste, &c. *Co. L. 309. b. R. 5 Co. 112, 113. R. 1 And. 285.*

And though there be a deed to declare the uses of the fine; for the reversion passed by the common law. *1 Sal. 90.*

And though the conuzee conveys before attornment, by bargain, &c. it is not good. *R. 5 Co. 113. b.*

Vide post, (L.)

(B)

(B) What shall be an Attornment.

(B. 1.) Express.

AN attornment is express or implied. *Co. L. 309. b.*
An express attornment is, when the tenant, &c. after hearing of the grant expresses his agreement to it. As, if he says, *I attorn to you, I agree, or am content with the grant, &c. Lit. S. 551.*

So, if the tenant, &c. deliver a penny, half-penny, &c. to the grantee, by way of attornment. *Ibid.*

So, any words which shew his assent to the grant. *Co. L. 310. a.*

As, if he say, *see my landlord. R. 3 Leo. 17.*

If he speaks to the grantee to renew his lease, though he does not agree to it. *R. 3 Leo. 17.*

Words in the absence, as well as in the presence of the grantee, are sufficient for an attornment. *Dy. 298. a. Co. L. 310. a. R. 2 Co. 68, 69. 1 Rol. 295. l. 16. 300. l. 25. Cro. Car. 440. Jon. 376, 7.*

So, if the tenant, &c. attorn to part of the thing granted, it is sufficient for the whole: as, if a reversion be granted of three acres, and the lessee attorns for one acre. *Co. L. 309. b.*

(B. 2.) Implied.

So, if the lord grant his services to the terre-tenant and a stranger; an acceptance of the grant by the tenant will be an attornment to the whole grant; for the services are thereby extinct for a moiety, and the stranger has the other moiety. *Co. L. 313. a.*

So, if he grant them to the husband of the terre-tenant; his acceptance will be an attornment in law. *Lit. S. 558.*

Or, if the grant be to the wife; acceptance of the deed by the husband is an attornment. *Lit. S. 559.*

So payment of the rent, or any part to the grantee, will be an attornment in law. *Co. L. 315. a.*

So, if a lessor oust his lessee for life, or years, and make a feoffment, and the lessee afterwards enters; this amounts to an attornment. *Co. L. 319. a.*

So, if a lessee for years die, and the lessor enters, and makes a feoffment, and then the lessee's administrator enters. *R. Mo. 875.*

If the lessee grants his interest to the grantee of the reversion. *R. Jon. 455.*

So an attornment in law for part of the services, &c. granted, is sufficient for all. *Lit. S. 563, 564.*

(C) What not.

BUT if the tenant has no notice of the grant, no act by him shall be an attornment: as, if a bailiff, or collector of rents of a manor purchase the manor; payment of rents to him, without notice of the purchase, does not amount to an attornment. *Co. L. 309. b.*

If the lord levy a fine of a manor, and take an estate to himself; payment to him, without notice, is no attornment. *Ibid.*

(D) At what Time an Attornment shall be.

SO every attornment must be in the life of the grantor, or grantee; otherwise it is too late. *C. L. 309. a.*

So, if a bishop grant a reversion, and afterwards resign or remove to another bishopric, an attornment afterwards is too late. *R. per three J. 3 Leo. 17.*

But if the tenant who ought to attorn dies, every one, who has his estate may attorn. *Co. L. 315. a.*

So, if a reversion be granted by fine, there may be an attornment to the heir after the grantee dies; for the estate passed by the fine, and the attornment is requisite only to give privacy. *Co. L. 309. b. 1 Rol. 295. K.*

Or, to him in the remainder by the fine, after the death of the tenant for life. *2 Co. 67. b.*

So every attornment must be according to the grant: and, therefore, if *A.* grant his reversion in fee, and afterwards, before attornment, confirm the estate of the lessee, in tail; the lessee cannot now attorn; for it will not be pursuant to the grant, which was of a reversion upon an estate for life or years, and now the reversion is expectant upon an estate tail. *Co. L. 310. a.*

Or, if the grant was of a reversion upon a lease for years, and he confirms the estate of the lessee, for life. *Ibid.*

So, if a lord grant his services to *A.* and afterwards grant them to *B.* to whom the tenant attorns; it will be good as to *B.* but if he afterwards attorns to *A.* it is void. *Lit. S. 552.*

Though the grant to *A.* be in fee, and to *B.* only for life, he cannot afterwards attorn to *A.* for it would not be according to his grant. *Co. L. 310. a.*

So, if he attorn to both grants together; it is void for incertainty. *Co. L. 310. b.*

Or, if a grant be to *A. bishop of B. and his heirs*, and afterwards to *A. bishop of B. and his successors*, and the lessee attorn to *A.* generally. *Ibid.*

So, if a woman lease for life, and afterwards grant the reversion for 1000 years, and then take husband, and afterwards the lessee attorns to the grant; it will be too late. *R. Cr. El. 270.*

(E)

(E) By whom it may be.

SO an attornment ought to be by him, who has privity: as, if the lord grant the services of his tenant, the *mesne* ought to attorn, and not the tenant *peravail*. *Lit. S. 555.*

If the tenant make a lease for life, or years, and the lord grant his seignior; the lessor ought to attorn, and not the lessee. *Lit. S. 554.*

If a manor be demised for life or for years, and afterwards the reversion be granted, the lessee ought to attorn; for it is not necessary that the tenants of the manor attorn, who before attorned to the lease for life or years, nor is it sufficient; for the privity lies between the lessor and his lessee. *Co. L. 311. a. 1 Rol. 292. l. 30, 35.*

So, if the lord grant his services, an attornment by his tenant for life, is sufficient for him in remainder, or reversion. *Lit. S. 557.*

So an attornment by an husband is sufficient for his wife. *Co. L. 312. b.*

An attornment by one jointenant is sufficient for all. *Lit. S. 566.*

So an attornment by an infant, &c. is good. *Co. L. 315. a. 1 Rol. 295. l. 35. 296. N. 1 Brownl. 47.*

But to a grant, or assignment of a rent-charge, or rent-seek, there must be an attornment by the tenant of the freehold, though there be no privity. *Co. L. 311. b.*

As, by a disseisor. *Ibid.*

So, to a grant of a reversion or remainder, the assignee of the lessee ought to attorn. *Co. L. 316. a. 1 Rol. 296. l. 20.*

Except in the case of a tenant in dower, or by the curtesy, who shall attorn after assignment. *Co. L. 316. a.*

Yet if a rent-charge in fee be granted for life, and afterwards the reversion of the rent is granted, the attornment may be by the grantee for life of the rent, or by the terre-tenant. *Co. L. 311. b. 1 Rol. 292. l. 25.*

(F) To whom.

SO an attornment to the *cestuy que use* is sufficient for the lessee. *Cont. 1 Rol. 295. l. 5. 300. l. 15. Acc. 1. Rol. 295. l. 11. Co. L. 310. a.*

So an attornment to the grantee for life, will be an attornment to the remainders dependant upon it. *Co. L. 310. a.*

Though the tenant expressly declare, that it shall not be for the benefit of the remainders. *Ibid.*

So, if there be a grant to several persons jointly, attornment to one is sufficient for all. *Ibid.*

So, if the conuzee of a reversion by fine grant the reversion before attornment, it may afterwards be made to the grantee, whereby

whereby the grantee will have the advantage of entering for a condition, distraining for rent, &c. *R. 5 Co. 112. b.*

So, if the conuzee disseise the lessee before attornment, and enfeoff *B.* an exprels attornment may be made to *B. R. 5 Co. 113. a.*

(G) Who are compellable to attorn.

SO where there is a grant of a reversion, or a remainder by fine, the lessee for life, or years, shall be compellable to attorn. *Vide Lit. S. 567, 568. Co. L. 315. b. 316. a.*

So, the assignee of the tenant for life, or years. *Vide Co. L. 316. a.*

So, a tenant in dower, or by the curtesy. *Ibid.*

Though it be after assignment. *Ibid.*

So, the assignee of a tenant in tail after possibility. *Co. L. 28. a. 316. a. Vide 1 Rol. 296. l. 51.*

So, tenant by statute merchant, staple, or *elegit*. *Co. L. 315. b.*

So, an executor who has land 'till debts paid; though he has not any certain interest. *Ibid.*

So an infant may be compelled to attorn. *Co. L. 315. a.*

So, to the grant of a seignory, or rent-charge, &c. the tenant is compellable to attorn, though he has it in fee, or in tail. *Co. L. 316. b.*

But tenant in tail is not compellable to attorn otherwise. *Co. L. 316. a.*

Nor, tenant in tail after possibility. *Co. L. 316. a. 1 Rol. 296. l. 51.*

So a lessee for life, &c. of the king is not compellable, without the king's licence. *Co. L. 318. a.*

So, if a fine be defeazible, none shall be compellable to attorn upon it; as, upon fine by an infant; by tenant in tail before the *fl. 4 H. 7.* and *32 H. 8.* Of lands in *ancient demesne*; an alienation in *mortmain*, &c. *Co. L. 318. a. 1 Rol. 297. l. 20, 25.*

(H) How they shall be compelled.

IF a fine be levied of a manor, reversion, remainder, &c. the conuzee may sue a *quid juris clamat, quem redditum reddit,* or *per qua servitia.* *Vide Fine, (F.)*

(I) What a Grantee shall do before Attornment.

IF a reversion, or remainder, be granted by fine, the grantee may do before attornment all that can be done without suing an action: as, he may seize a ward, heriot, &c. *Co. L. 320. a.*

So he may enter into the land of a ward. *Ibid.*

Or, lands escheated. *Ibid.*

Or, for a forfeiture by alienation of a lessee for life, or years, tenant by statute, *elegit*, &c. *Ibid.*

(K) What not.

BUT where a reversion, or remainder, is granted by deed, the grant will be void till attornment. *Co. L. 314. b.*

So, if there be a grant of a seignory or services; for nothing passes in possession, or right, till attornment. *Co. L. 310. b. 311. a.*

So, if a reversion, or remainder, be granted by fine, the grantee cannot have an action against his tenant before attornment; and therefore cannot distrain; for an avowry for rent and services is in nature of an action. *Co. L. 320. a. Semb. 2 And. 15.*

So he cannot have an action of waste. *Co. L. 320. a.*

Nor, debt for rent.

Nor, a writ of entry *ad communem legem, in casu consimili*, or *casu proviso*. *Co. L. 320. a.*

Nor, a writ of ward. *Ibid.*

Nor, covenant for rent. *Semb. 1 Sal. 82.*

So he shall not have debt, nor distrain for a relief, &c. *Co. L. 320. b.*

So he shall not take advantage of a condition broken, as assignee by the *ft. 32 H. 8. 34. R. 5 Co. 112. b.*

So, if the tenant attorn, the grantee shall not have waste, or an action for the arrearages of rent incurred after the grant and before attornment; for the attornment relates to pass the estate *ab initio*, but not to charge the tenant. *Co. L. 310. b.*

(L) When an Attornment is not necessary.

BUT attornment is not necessary, where the estate passes by way of use; for the *ft. 27 H. 8. 10.* executes the possession to the use. *Co. L. 309. b. R. Dy. 30. a.*

As, if the conveyance be by covenant to stand seised, &c. (A)

By bargain and sale by deed indented and inrolled. *Co. L. 309. 1 And. 286. Vide ante.*

So, if a reversion be passed by bargain and sale for years. *R. 2 And. 203. 2 Co. 35, 36.*

So, if the conveyance be by fine to the use of another; an attornment is not necessary. *Co. L. 309. b. R. 6 Co. 68. 2 And. 15.*

Or, to the use of the conuzor. *Vau. 47.*

Or, to the use of the conuzee himself. *6 Co. 68. b. Semb. cont. Skin. 387.*

So, if the use be created by the law, or by declaration of the party; for it is all one. *6 Co. 68. b.*

So, if there be no declaration of the uses, whereby the fine will be to the old uses. *Vau. 43.*

So, an attornment is not necessary, where a reversioner in fee releases to him, who has a reversion, or remainder for life, after
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an estate for life, or years. *Lit. Sec.* 575. 1 *Rel.* 301. l. 40, 42, 303. l. 5. *Vau.* 45.

Or, where one jointenant releases to his companion. *Lit. S.* 574.

So, if a remainder in fee to the right heirs of a tenant for life, or years, be granted, no attornment is necessary; for he need not attorn to his own grant. *Lit. S.* 578.

So, if a lessee surrenders to the lessor, no attornment is necessary. *Pl. Com.* 87. b.

So, if there be an admittance to the reversion of a copyhold; no attornment is necessary. *R.* 4 *Leo.* 25.

So, if a lord or a reversioner has his estate by escheat; there is no need of attornment. *Co. L.* 321. 5 *Co.* 113. a.

Or, by devise; for a devisee has no power to compel an attornment. *Co. L.* 322. *Mo.* 281.

So, if the donee of a statute merchant, &c. has it by extent. *Co. L.* 321. b. *R. Dal.* 34, 69.

So, if a devise be to *A.* for life, and that his executor shall sell the reversion, who does sell it; no attornment is necessary to the sale. *Semb.* 19 *H.* 6. 24. a.

So, if there be a recovery by title, or upon pretence of title, no attornment is necessary. *Co. L.* 104. b.

So, by the *st.* 7 *H.* 8. 4. recoverors in a common recovery may distrain and make avowry, &c. without any attornment.

And by the *st.* 21 *H.* 8. 15. they may have debt for rent, and waste. *Co. L.* 104. b.

So, if one has a reversion by act in law, there needs no attornment: as, if a woman has dower of a rent. *Dal.* 34.

Or, a lessee has not possession, but a future interest in the term only. *Semb. Skin.* 387.

So a grant by the king will be good without attornment. *Co. L.* 309. b.

And a grant to the king, by his prerogative. *Co. L.* 309. b.

Though it be a grant of a reversion under the dutchy seal, of lands within the dutchy, but out of the county palatine. *R.* 1 *Lev.* 28.

So an attornment is not necessary, to a grant of a future interest, or a reversion for years. *Dub. Dy.* 26. a. 58. a. *R. cont.* 3 *Leo.* 17. where the grant was of a reversion, to pass as a reversion. *R. acc. Dal.* 89.

So, if there be a lease of ten acres, and afterwards the lessor leases the whole farm, of which the ten acres are parcel, to *B.* for twenty years, to commence at a future day; *B.* shall have the ten acres after the former term of them expires, without attornment. *Per three J. Harp. cont. Dy.* 350. a. *Bend. Pl.* 286.

So, if *A.* lease to *B.* for years, and afterwards to *C.* for years, and then grant the reversion by fine to *D.* though an attornment is necessary as to *B.* yet it is not so as to *C.* for he had only an *interesse termini*, and the reversion at the time of the fine was dependant upon the estate of *B.* *R.* 1 *Sal.* 90.

So, if *A.* lease to *B.* for forty years, who makes a demise for 15 years, and afterwards assigns his reversion for forty years; there needs no attornment by the lessee for fifteen years. *Dub. Dy. 307. b.*

So, by the *stat. 4 & 5 Ann. 16.* from the first day of *Trinity Term 1706*, all grants and conveyances thereafter to be made of any manors, rents, reversion, or remainder, &c. shall be good to all intents and purposes, without any attornment of the tenants, &c.

Provided, no such tenant shall be prejudiced by payment of rent to the grantor or conuzor, or by breach of any condition for non-payment of rent, before notice to him of such grant by the conuzee or grantee. **Vide Doug. 279.**

*But where an assignment was made before this statute, without attornment. This statute will not help the assignee to bring an action of covenant. *Str. 78.**

(M) When it shall be pleaded.

WHEN an attornment is necessary to make a grant effectual; in pleading of the grant, the attornment also must be pleaded. *1 Sal. 90.*

And if it be pleaded, the defendant may say, *That nothing passed by the deed*, and give in evidence the default of attornment, or traverse the attornment. *Dy. 31. a. b.*

[In replevin, the avowant for a distress taken for a fee-farm rent, must set out an attornment upon a fine at common law to the devisor under whom he claims. *Long v. Buckeridge, T. 4 G. Str. 106*]

But there is no need of a *venue* where the attornment was made; for it shall be intended to be made upon the land. *1 Sal. 91. Semb. cont. Pl. Com. 191. a.*

So, if *non concessit* be pleaded to the grant, an attornment need not be given in evidence; for it is not the act of the grantor, and was traversable in itself. *R. 1 Sal. 91.*

So, if the grant of a manor be pleaded, no attornment of the tenants need be alledged. *1 Sal. 91.*

A T T O R N E Y.

(A) For what Purposes there may be an Attorney.

AN attorney is he, who is appointed to do any thing in the place of another.

And he has a general authority, or a special one for some particular purpose; as to make livery; (*de quo vide post, (C. 1, 4)*)

To deliver a deed, &c. (*de quo vide post, (C. 1.)*)

And how the authority must be pursued, *vide post, (C. 11, &c.)*

(B)

(B) Attorney in Court.

(B. 1.) Who shall be.

SO there may be an attorney *ad prosequendum*, or *defendendum*, in any court.

By the *stat. 4 H. 4. 18.* All attorneys shall be examined by the justices, and at their discretion put in a roll, and those found virtuous and of good fame, shall be sworn.

The attorneys of *B. R.* are of record, as well as the attorneys of *C. B.* 1 *Rol. 3.*

And shall be allowed as attorneys at the assises. *Ruled, 1 Rol. 3.*

By the *stat. 2 G. 2. 23.* After 1 *Dec. 1730.* None shall act as an attorney, &c. in any court of record, unless he take oath, truly and honestly to demean himself in the practice of an attorney, according to the best of his knowledge and ability, and be admitted and inrolled as such before or after the said 1 *Dec. 1730.* And a judge of the court, before he admit him to take the oath, shall examine, by such means as he thinks fit, his fitness or capacity to act, and, if satisfied he is qualified, shall give the oath, and cause him to be admitted and inrolled, and sign his admission on parchment lawfully stamped. And after 1 *Dec. 1730.* no person shall be admitted, &c. unless bound five years as a clerk to an attorney sworn and admitted, and have continued five years in such service, and unless he be also examined, sworn, admitted, and inrolled.

So inferior persons may be allowed to solicit causes in court, and it shall not be maintenance. *Cro. Car. 160, 194.*

By the *stat. 3 Jac. 7.* None shall be allowed to solicit in the courts at *Westminster*, but such as are known to be men sufficient, and of honest disposition.

So, by the *stat. 2 G. 2. 23.* After 1 *Dec. 1730.* none shall be admitted as a solicitor, &c. unless he take an oath to demean himself truly and honestly in the practice of a solicitor, according to the best of his knowledge and ability: and be admitted and inrolled in the court where he acts, after or before the 1 *Dec. 1730.*

And the master of the rolls, two masters of *chancery*, barons, &c. or any one of them, before he admit, shall examine by such means as he thinks proper, his fitness and capacity to act, and if satisfied he is qualified, &c. shall give the oath, and cause him to be admitted and inrolled, and sign his admission on a treble 40s. stamp.

No person shall act after 1 *Dec. 1730.* unless admitted before, or bound five years, &c. and hath continued five years in service, and be sworn, &c.

* But see several instances of attorneys admitted on special circumstances. 2 *Bl. Rep. 734, 764, 957.**

So a man, who is not an attorney, may be admitted as an attorney in a particular action by the court. *R. 2 Cro. 521. Qu?*
 If this be not altered by the *st. 2 G. 2. 23.?*

An attorney in the courts at *Westminster* shall be allowed to practise in inferior courts. *Semb. 1 Vent. 11. 1 Sid. 401. 1 Mod. 23.*

[By *12 G. 2. c. 13. st. 3.* The act for the regulation of attorneys is continued, and by *30 G. 2. c. 19. st. 75.* made perpetual.]

[By the same, *st. 7.* None but regular attorneys may act in the county-court, under penalty of *20l.*]

[By the same, *st. 8.* Quakers may be admitted on their affirmation.]

[By *stat. 22 G. 2. c. 46.* An affidavit shall be made and filed in three months, by master and clerk, of the execution of the articles, and none shall be admitted till it is produced and read in court.]

[Affidavit of actual service for five years shall be made by clerk or master, and filed.]

[Master dying or discontinuing practice, or clerk discharged and serving the residue of his time with another, and making the proper affidavits, may be admitted.]

[Sworn clerks in chancery, or their clerks for five years, may be admitted solicitors; or if their masters die, and they serve under articles with others.]

[Sworn clerk to have but two articulated clerks.]

By *23 G. 2. c. 26.* Persons admitted solicitors may, if qualified, be admitted attorneys without stamp or fee.

[Attorney of *B. R.* must have a new stamp to be admitted attorney of *C. B.* *Barnes 38.*]

[A clerk to a man as a scrivener, though he is also an attorney, shall not be admitted. *Barnes 39.*]

[Notice of motion in chancery, given by a person not admitted a solicitor, is not good. *Grosvenor's case, P. 1731. 3 P. W. 103.*]

[An attorney's name may be struck out of the roll of attorneys at his own instance. *Kidwell's case, P. 9 G. 2. B. R. H. 232.*]

[And restored on motion. *Barnes 42.*]

* But before he be restored, the court will impose on him the terms of taking no advantage of his privilege, in any action then depending. *Doug. 114.**

* If an attorney, having been struck off the roll at his own request, be afterwards called to the bar, the court will not permit him to be put on the roll again, unless he has been disbarred on application for that purpose to the inn of court where he was called. *Doug. 114.**

(B. 2.) Who not.

But by the *st. 4 H. 4. 19.* No steward, bailiff, or minister of lords of franchises, who have return of writs, shall be attorney in any suit within the franchise where he is officer.

By

By the *st.* 1 *H.* 5. 4. No under-sheriff, sheriff's clerk, receiver, or bailiff, shall be attorney in the king's court while he is in office.

*If an attorney be convicted of felony, the court will strike him off the roll though he has been burnt in the hand, and suffered imprisonment pursuant to his sentence; because he is an unfit person to practise as an attorney. *Cowp.* 829.*

By the *st.* 3 *Jac.* 7. None shall be admitted attorney in any of the king's courts, unless brought up in the same or otherwise well practised in the soliciting of causes, and found by their dealings to be skilful and honest.

Nor, by a rule *Mich.* 1654. in *C. B.* unless he have practised as a solicitor, or served as a clerk to a judge, serjeant, practising counsellor, attorney, clerk, or officer of one of the courts at *Westminster* five years, (save when his master dies, or gives over practice,) and proof be made of the service to the prothonotary, and filed with the clerk of the warrants. *Vide Rules and Orders of C. B.* 3.

Nor, by a rule, *Mich.* 4 *Ann.* unless admitted of some of the inns of court, or chancery. *Vide Rules and Orders of C. B.* 124, 5.

(B. 3.) How regulated.

*Anciently there were rolls kept of the attornies, but since the stamp act that method had been discontinued, and a book stamped and the names entered in that: but in *Hil.* 4 *G.* 1. the court of *B. R.* said that this book must be taken as minutes from which the record might be made up, and ordered that to be done regularly for the future. *Str.* 77.*

By a rule in *C. B.* *Mich.* 1654. All attornies shall be admitted of some of the inns of court or chancery, on pain of being put out of the roll. Confirmed *Mich.* 4 *Anne.* *Vide Rules and Orders of C. B.* 1. 124, 5.

So he shall be in commons one week every term. *Vide Rules and Orders of C. B.* 1.

And take chambers there, or near such inn. Confirmed *Mich.* 4 *Ann.* except inhabitants in *London*, *Westminster*, *Southwark*, or the suburbs, and the liberty of the *Tower*, and *St. Katherine's*. *Vide Rules and Orders of C. B.* 1. 124, 5.

By the *st.* 2 *G.* 2. 23. Any person sworn an attorney in any court of *Westminster*, great sessions, or county palatine, or as a solicitor in a court of equity, may, with the consent of an attorney in other the said courts in writing signed, in the name of such attorney, sue, or defend, &c. in such other court, though not sworn and admitted there: but by *sect.* 17. if a sworn attorney permit any, not sworn, &c. as an attorney or solicitor in some one of the said courts, to act in his name, and be convicted, &c. he shall be disabled to act, &c.

By the *st.* 33 *H.* 6. 7. There shall be but six attornies in *Norfolk*, and six in *Suffolk*, and two in *Norwich*, to be elected and admitted

admitted by the two chief justices; and every other shall forfeit 20*l*.

[If attorney's name is set to proceedings without authority from him, they shall be set aside. *Openheim v. Harrison*, M. 30 G. 2. 1 B. M. 20.]

[And the court will grant attachment against the person who sets an attorney's name to proceedings without leave from him. *Ibid.*]

[Attorney of C. B. may act in great sessions of *Wales*, in name of attorney of that court, and declare for fees there. *Barnes* 160.]

[The court will not suffer an attorney to take an improper person (as a turnkey to a prison) for an articulated clerk; but will cancel the articles. *Frazer's case*, P. 30 G. 2. 1 B. M. 291.]

[By the *fl.* 22 G. 2. c. 46 Attorney who has left off practice shall not take an articulated clerk.]

[Clerk shall be employed the whole time in the business of an attorney.]

[Attorney acting as agent for unqualified person, or suffering his name to be used for his profit, shall be struck off the roll, and for ever disabled, and may be committed not exceeding one year, and forfeits 50*l*.]

[Person not admitted according to 2 G. 2. c. 23. forfeits 50*l*. and treble costs.]

[Clerk of the peace, or under-sheriff, acting as attorney at quarter-sessions, forfeits 50*l*.]

(B. 4.) In what Cases an Attorney shall be allowed.

By the common law every one commanded by the king's writ (B. 4.) to appear, ought to appear in person. 8 Co. 58. b. *Beecher*. By the common law. F. N. B. 25. C. 2 *Inf.* 249.

But after appearance, the court of *chancery*, B. R. or C. B. or other court which held plea by writ, might admit him by attorney. 8 Co. 58. b.

So a court which held plea without writ, if the king had granted a writ *de attornato faciendo*. 8 Co. 58. b.

Otherwise, if there was not any such writ. *Ibid.*

So the king by his prerogative might grant to the demandant or plaintiff, tenant or defendant, in every suit to make an attorney, and order the court to admit him by attorney; which ought to be done. F. N. B. 25. C. Reg. 136.

So he may grant to make a general attorney, in all pleas *motis vel movendis*, and in all courts. F. N. B. 25. E.

And the king may name the attorney or grant to the party to make *quem aut quos voluerit*. *Ibid.*

And such grant may be either under the great, or privy seal. F. N. B. 26. B.

So now, by the *fl.* of *Merton*, 20 H. 3. 10. Every freeman, (B. 5.) who owes suit to the county, hundred, wapentake, or court of By statute. his

his lord, may make an attorney to do those suits. *Vide in Copyhold* (K. 15.)

By the *st. Gloucester*, 6 *Ed.* 1. 8. In trespass, where an appeal lies not, the defendant may make an attorney. *Vide 2 Inst.* 313.

By the *st. W.* 1. 3 *Ed.* 1. 42. In writs of assise, (but this does not extend to an assise of *novel disseisin*, 2 *Inst.* 249,) attain and *juris utrum*, the tenant after appearance shall not be effoigned, but may sue by attorney.

By the *st. W.* 2. 13 *Ed.* 1. 10. Persons impleaded for tene-ments, in *eyre*, or before the justices of *Westminster*, or in *B. R.* or assises, in county court, or court: baron, may make a general attorney, to sue for them in all pleas, moved for against them, during the circuit; who shall have full power, till the plea deter- mined, or he removed by his master.

And this extends to a corporation sole or aggregate, as well as to private persons. 2 *Inst.* 378.

And to all pleas before any justices in *eyre*. 2 *Inst.* 378.

By the *st. 7 R.* 2. 14. General attorneys, made by persons out of the realm, may appear and answer for their master, and make attorneys under them in *præmunire*, as well as other writs and complaints.

By the *st. of York*, 12 *Ed.* 2. 1. Tenants in assise of *novel disseisin*, (who were not within *W.* 2. 10. 2. *Inst.* 378,) may make attorneys, but yet may plead by bailiff, as before.

By the *st. 3 H.* 7. 1. In an appeal of murder, when battle lies not, the appellant may make an attorney, and appear in the same, after the appeal commenced, till the end of the suit and execution.

So he may, after appearance. *F. N. B.* 26. *P.*

By the *st. 23 H.* 8. 3. In an attain every of the petit jury may appear and answer by attorney.

By the *st. 29 Eliz.* 5. and 31 *Eliz.* 10. In suits or informa- tions on penal statutes, every natural born subject or denizen, where he isailable, and the court may allow an attorney, may appear on the first process by attorney.

By the *st. 7 H.* 4. 13. persons outlawed or waived may be admitted by attorney, but in a *capias ad satisfaciendum* the com- mon law shall hold place. *Vide post*, (B. 6.)

And it is now the common course for the plaintiff or defen- dant in all manner of actions, where there may be an attorney, to appear by attorney, and put in his warrant without any writ. *F. N. B.* 26. *D.*

And therefore, generally, in all actions real, personal, and mixt, the demandant or plaintiff, tenant or defendant, may ap- pear by attorney.

And at the return of a *grand cape* or *petit cape*, he may tender his wager of law by attorney, and pray a day to make his law. *F. N. B.* 26. *F.*

So he may demand consuance by attorney. *F. N. B.* 26. *O.*

So he may sue a writ of error by attorney. *F. N. B.* 26. *I.*

So he may join in aid, or receipt by attorney. 11 *H.* 4. 28. *A.*

So

So in an appeal against abettors, the plaintiff shall make an attorney. *F. N. B. 26. K.*

So in an appeal after appearance by the *st. 3 H. 7. 1. F. N. B. 26. P. 1 Sal. 62.*

So in a suit against the king, a man may make an attorney. *F. N. B. 26. G.*

So the defendant may appear by attorney, though the sheriff return, *non est inventus*. *1 Rol. 289. l. 20.*

So, if error be assigned, that the plaintiff is dead; and an attorney appears in his name, and pleads, that he is alive; it is good, though it be found, that he was dead. *R. Ray. 59. 1 Sid. 93.*

So, upon an indictment for a trespass or extortion, the defendant, *ex gratia*, may appear by attorney. *1 Rol. 289. l. 10.*

Or, for other misdemeanor. *1 Lev. 146.*

(B. 6.) In what Cases not.

But in any case, where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person.

As if he comes in by a *cepi corpus* upon an exigent. *F. N. B. 26. E.*

Or, be outlawed. *2 Cro. 462. R. 2. Cro. 616. R. Carth. 7.*

But now by the *st. 4 & 5 W. & M. 18.* In outlawry, except for treason or felony, the defendant may appear, and reverse it by attorney.

So upon an attachment after a return of a rescous, he shall not make an attorney. *F. N. B. 26. H.*

So if the defendant comes in upon a *cepi corpus*, he shall not make an attorney, till plea pleaded. *F. N. B. 26. E.*

So in a *quæ reddendum reddit* he shall not make an attorney till plea, without assent. *F. N. B. 26. L. R. Cont. 32 H. 6. 22, 3.*

So in a writ of right, the court will not admit the tenant by attorney, without a writ *de attornato faciendo*, or that the tenant acknowledge him to be his attorney upon record before some justice, and the justices record the warrant. *F. N. B. 26. D.*

Nor in writ by covin between the parties, or a writ of entry in the *post. Ibid.*

So in a *præmunire*, he shall not be admitted without writ. *F. N. B. 26. M.* But *Semb. cont.* by the *st. 7 R. 2. 14. Vide Ante (B. 5.)*

Nor a vouchee to a *sequatur sub suo periculo*. *F. N. B. 27. D.*

So in an appeal of murder, the plaintiff cannot appear by attorney, before he has counted. *R. 1 Sal. 64, 62. Carth. 55.*

Nor can proceed by attorney after appearance, where battle is waged. *1 Sal. 62.*

So the defendant in an appeal of mayhem shall not make an attorney. *F. N. B. 27. F.*

But

But if the plaintiff in an appeal be present in person, and his count says, *per attornatum*, it may be struck out before filing. 1 *Sal.* 64.

So where the presence of the party is necessary, he cannot appear by attorney: As in appeal of mayhem, the plaintiff cannot appear by attorney; for the defendant may demand *oyer* of the mayhem. *R. 2 Inst.* 313.

So a *retraxit* cannot be by attorney; for it is a contempt to the court, which is personal. *R. 8 Co.* 58. *a. b.* 1 *Rol.* 366.

So after a *capias ad computandum* awarded, he shall not make an attorney. *F. N. B.* 26. *N.*

So *misnomer* must be pleaded in person. *F. N. B.* 27. *A. Vide Abatement, (I. 17.)*

So in a *quid juris clamat*, or *per qua servitia*, he shall not make an attorney till plea; for he ought to attorn in person. *F. N. B.* 26. *L.* 1 *Rol.* 219. *l. 5, 7.* *Dub.* 32 *H.* 6. 22, 3.

So a disseisor in an assise cannot appear by attorney; for he is not within the *st.* 12 *Ed.* 2. 1. 1 *Rol.* 288. *E. Vide Affise, (B. 15.)*

So an idiot cannot sue, or defend by attorney, but ought to be in person. *F. N. B.* 27. *G.* 2 *Sand.* 335, 6.

So an infant cannot sue by attorney, but by guardian, or *prochein amy.* *F. N. B.* 27 *H. Vide in Pleader, (2 C. 1.)*

So an infant cannot defend by attorney, but by guardian. *F. N. B.* 27 *H. Vide Pleader, (2 C. 2.)*

If a man appears by attorney, where by reason of a contempt, &c. he ought to appear in person, it is not error; for the court may dispense with a contempt to themselves. 8 *Co.* 58. *b.*

So in a case of extremity, the court may connive at it. 2 *Cro.* 462.

And now by the *st.* 4 & 5 *W. & M.* 18. In all cases, except treason and felony, the defendant may appear to reverse an outlawry by attorney, without putting in special bail, unless where required by the court.

So if the court admit a man as an attorney, who is no attorney, it is not error. *R. 2 Cro.* 521.

But if a man, who is not capable, as an infant, idiot, &c. appear by attorney, it is error. *Vide in Pleader, (2 C. 1.)*

So if a man enter a *retraxit* by attorney. *R. 8 Co.* 58. *b.*

(B. 7.) Warrant of Attorney.

An attorney, who appears, ought to have a lawful warrant.

And therefore, if the name of the party who makes the attorney, be mistaken, the warrant is not good: As *Alicia* for *Elizabeth*, for it is not any warrant for *Elizabeth*. *R. Dy.* 105.

So if the name of the other party be omitted or mistaken.

So if in a suit by an executor, &c. *A. ponit loco suo* such an one his attorney against *B.* without naming him executor, it is not sufficient. *Dub.* 1 *Rol.* 289. *l.* 25.

So

So if the attorney's name be omitted. *R. Dy. 93. b. 1 Rol. 289. l. 30.*

Or his Christian name. *R. 1 Rol. 289. l. 35. R. 1 Rol. 336, 381.*

So if the warrant of attorney for the tenant in a common recovery be dated after the judgment, it is not good. *1 Rol. 290. l. 25.*

So a warrant of attorney for the principal, is not sufficient for the bail, in a *seire facias* against him; for they are distinct suits. *R. Sal. 603.*

[So attorney cannot appear for tenant in possession by order of the landlord. *Barnes 39.*]

But it is sufficient that the authority to the attorney be given by writing upon the process, that such an one shall be his attorney. *1 Sid. 31.*

And if the attorney appears, the court does not inquire, whether he had a good authority. *1 Sal. 86.*

And if he be sufficient, does not set aside the judgment, though entered without warrant. *1 Sal. 88.*

Otherwise, if the attorney is not responsible. *Ibid.*

So a misprision in a warrant of attorney shall be amended. *Vide Amendment, (E. 1, 2.)*

So default of it shall be aided after verdict by *§. 18 Eliz. 14. Vide Amendment, (E. 1, 2.)*

If the defendant, being arrested, indorse upon the process, that *A.* shall be his attorney; he need not accept it. *R. Sid. 31.*

So appearance by an attorney must be entered upon record.

But it is sufficient to say, that *A. venit per B. C. attornatum suum.*

So if it be, that *A. praesens hic in curia per B. attornatum suum*, it will be well. *1 Leo. 9.*

By the *§. 18 H. 6. 9.* An attorney shall enter his warrant on record in all actions, where a *capias* and *exigent* lies, the same term the *exigent* is awarded, or before, on pain of 40*s.* to the king. (B. 8.)
When it shall be entered or filed.

By the *§. 32 H. 8. 30.* He shall deliver his warrant to be entered on record in all suits, the same term the issue is entered, or before, on pain of 1*ol.* and imprisonment at the discretion of the justices.

If the issue be upon *nul tiel record*, it is within the *stat. Dy. 180. a*

By the *§. 18 El. 14.* He shall deliver it to be entered or filed, &c.

Yet in actions where an imparlance is allowed, or there is judgment by *nil dicit*, or *non sum informatus*, it is sufficient, if the warrant of attorney be entered, when judgment is given. *R. 2 Rol. 186. Vide Amendment, (E. 2.)*

So in dower where the *grand cape* is returnable the next term, and there is judgment upon it, it is sufficient, if it be entered in such second term. *2 Rol. 186.*

[If the warrant is of any term *pendente lite*, it is sufficient. *Noke v. Caldecot*, T. 8 G. Str. 526. *Henriques v. Dutch W^{est} India Company*, T. 2 G. 2. Str. 807. *Ld. Raym.* 1532. * *Doug.* 115. *

So for avoiding of error, it is sufficient if the warrant be entered before judgment, or before a writ of error sued. *Dy.* 180. a. 1 *Rol.* 290. l. 5.

If filed before final judgment. *R. F. g.* 191.

Or after error brought, if the writ of error be afterwards delayed. *R. Dy.* 180. a. 225. a. 1 *Rol.* 290. l. 10, 15. *R.* 1 *Brownl.* 46.

And it is sufficient that the warrant be filed, though it be not entered; and that is the usual course. *Per Dodd.* 1 *Rol.* 408.

So it is sufficient that the warrant be filed in any term, though it be not of the term in which it ought to have been. *R.* 2 *Cro.* 277.

So if the plaintiff brings error, and assigns default of warrant of attorney in such a term, and it be certified that there is none; and afterwards there are two *scire facias*'s and *nichil* returned, and the roll marked for reversal, before the reversal entered, there may be another *certiorari*. *R.* 2 *Cro.* 277. 1 *Bul.* 21.

[On affidavit and certificate from *Ireland*, that there is no warrant of attorney, the court will not set aside that assignment of errors, but send a *certiorari*. *Alcock v. Carter*, H. 9 G. Str. 545.]

By the *st.* 4 & 5 *Ann.* 16. The plaintiff's or demandant's attorney shall file his warrant of attorney with the proper officer the same term he declares; and the attorney for the defendant or tenant the same term he appears, under the penalties inflicted on attorneys by any former law.

In a *scire facias* the warrant of attorney ought to be entered at the return of the *scire facias*. *Sal.* 603.

But a judgment shall be good, if it be entered by the plaintiff at any time before the defendant pleads. *R.* 2 *Mod. Ca.* 77.

By the common law, the default of a warrant of attorney, or a misprision in it, was error; but the misprision shall be now amended, and the default of a warrant after verdict shall be aided. *Vide Amendment*, (E. 1, 2.)

(B. 9.) How long his Authority continues.

If an attorney be retained, his authority continues till the end of the cause, or a countermand. 1 *Rol.* 291. l. 25.

And no other can intermeddle without his consent or death. 2 *Rol.* 456.

And his authority cannot be countermanded without a rule of court, or the order of a judge or prothonotary, and notice to the other party or his attorney. *Compl. Att.* 292. * *Doug.* 217. *

* And payment by defendant to plaintiff's attorney privately countermanded without rule of court, is good. 1 *Black. Rep.* 8. *

* For payment to the attorney is payment to the principal. *Doug.* 624. *

* But the attorney must have had a real authority from the plaintiff: for if *A.* be indebted to *B.* and pay such debt to the attorney of a person suing *A.* in *B.*'s name, but without his authority, *A.* must pay *B.* again, and *A.*'s remedy is against the attorney, though such attorney conceived he was acting under the real authority of *B.* 1 *Term Rep.* 62. *

And the attorney himself, after he accepts the warrant, or takes upon him to appear for any person, cannot afterwards refuse to be his attorney. *R.* 1 *Sid.* 31. * *Str.* 693. *

So if he has a special authority for a time certain, which expires before the cause determines, he continues attorney. 1 *Rol.* 291. l. 25.

So if a plea in *C. B.* be removed upon a demand of conuizance, the attorney continues his attorney in the franchise. *R.* 1 *Rol.* 290. l. 45.

So if after conuizance granted it be remanded, the same attorney continues. 1 *Rol.* 290. l. 48. * 2 *Ld. Raym.* 896. *B. R. H.* 131. *

So if a judgment in *C. B.* be reversed in *B. R.* for error in the process, and it be proceeded upon there on the original, the attorney in *C. B.* continues attorney in *B. R.* 1 *Rol.* 290. l. 50.

So at the day given for wager of law, the attorney may plead a release *puis darrein continuance*; for though he ought to make his law in person, the authority of the attorney continues. 1 *Rol.* 291. l. 5.

So the plaintiff may enter a *remitit dampna* by attorney, and it need not be *in propria persona*. 1 *Sal.* 89. * 2 *Ld. Raym.* 1142. *

(B. 10.) When it determines.

But the authority of an attorney determines by the judgment. 2 *Inst.* 378. 1 *Rol.* 291. l. 10.

And therefore, after judgment he cannot release damages. 1 *Rol.* 291. l. 10. *Cont.* 1 *Sal.* 89.

Or acknowledge accord by the defendant with the plaintiff. 1 *Rol.* 291. l. 15.

Yet after judgment, the attorney may sue execution within the year, without a new warrant. 2 *Inst.* 378.

And if he sue execution within the year, he may prosecute it after the year. 2 *Inst.* 378.

So he may sue a *scire facias* against bail. 1 *Sal.* 89.

Though after the *scire facias* returned, there ought to be a new warrant of attorney; for it is a new action. *R.* 1 *Sal.* 89.

So after judgment he may acknowledge satisfaction upon record, on receipt of the money. 1 *Rol.* 291. l. 17. 1 *Rol.* 366.

So though he receives nothing. 1 *Rol.* 291. l. 20. *Cont.*
per Coke 1 *Rol.* 366. but *Dod.* and the Clerks accord. 1 *Rol.* 367.

(B. 11.) When he shall be removed.

So the party, with the licence of the court, may discharge his attorney. *Pr. Reg.* 2, 4.

But if the plaintiff after judgment receives the money, and gives a warrant to an attorney to acknowledge satisfaction, but before satisfaction acknowledged revokes his warrant; the court will not suffer process upon the judgment, without their licence. *Ray.* 69.

So if the defendant gives a warrant for appearance, he cannot revoke his warrant till appearance. *Sti. Pr. Reg.* 2.

[He shall not be removed till his costs are paid. *Barnes* 40.]

(B. 12.) New Attorney made.

By the *fl.* 4 *H.* 8. 18. If an attorney die, or be removed, the justices shall make another in his place.

(B. 13.) What will be a Contempt to the Court.

An attorney being an officer of the court, if he attempts any thing which he cannot, or ought not to do, it will be a contempt to the court; for which an attachment shall go against him. *Vide Post*, (B. 14, 15.)

So an attachment lies against any one, who abuses, or does not pay obedience to the process, or injunction of the court. *Vide in Chancery*, (D. 3.)

So if he misbehave himself in the view of the court. *Vide Leet*, (N. 1.)

So if he practice fraud or vexation to another under colour of a legal procedure: As if he make a lease to *A.* of the lands of *B.* and afterwards procures *A.* to bring an ejectment against the casual ejector. *Sav.* 31. * *Vide Attachment.* *

* So arresting a party while attending an arbitrator under a rule of court. 2 *Bl. Rep.* 1110. *

(B. 14.) What Things an Attorney ought not to do.

By the *fl.* 4 *H.* 4. 18. Attornies shall be sworn to make no suit in a foreign country.

By the *fl.* *W.* 1. 3 *Ed.* 1. 29. No serjeant, counter, nor any other, (which extends to attornies, clerks in court, and others, 2 *Inst.* 224.) shall do any manner of deceit, &c. or consent to do it, to beguile the court; and if he be thereof attainted, he shall be imprisoned for a year and a day, and if the trespass demand a greater punishment, it shall be at the king's pleasure.

And

And therefore, if an attorney by an *habere facias seisinam*, which falsely recites a recovery, where there never was any, gains the possession of the land, and ousts another of his freehold, this is a deceit and collusion within this statute. 2 *Inst.* 215.

So if he bring a *præcipe quod reddat* against *A.* whom he knows to have nothing in the land, with intent to gain the possession against the terre-tenant. *Ibid.*

So if a prisoner in the compters makes an obligation for 20*l.* to *A.* and procures a writ upon it in *C. B.* by which upon an *habeas corpus* he may be removed to the Fleet; the attorney privy to this does a deceit within this statute. *Ibid.*

So if he deliver a declaration in ejectment to a man who feigns himself tenant, and so obtains possession. *Mod. Ca.* 16.

So it is a deceit, if an attorney takes out a *capias* without filing an original. 2 *Inst.* 215. *Cro. Car.* 74.

If he knowingly plead a false plea. 2 *Inst.* 215. (a)

If he raze a record. *Hob.* 9.

If he procure an attorney to confess an action for the other party. *D. Hob.* 9.

If he falsify or forge a writ. *Cro. Car.* 74.

If he appear and suffer judgment by default, without any authority. 2 *Cro.* 694.

So if an attorney at the day when a trial is appointed at bar, will not put in the writ, he shall be committed. 4 *Mod.* 367.

If he assign infancy for error, when the man was thirty years of age. 1 *Mod.* 41. *Sal.* 516.

If he discontinue an action in *C. B.* after a plea in *B. R.* of the action there depending. 1 *Mod.* 41.

If he plead a fact which he knows to be false. *Sal.* 515.

So an attorney ought not to prosecute an action to be paid in gross; for that will be champerty. *Per Hob.* 117.

So if he be attorney for the plaintiff, and acts as clerk for the defendant in the star-chamber, he will be an *ambidexter*. *Lit.* 14.

So in *B. R.* *Cont. Lit.* 14.

By the *st.* 3 *Jac.* 7. If an attorney or solicitor willingly delay his client's cause for gain, or demand by his bill other monies than were disbursed, the party grieved shall have an action, and recover his costs and treble damages, and the defendant shall be discharged from being an attorney, or solicitor, any more.

And upon this an information lies for extortion. 1 *Mod.* 5. *Dub.* 1 *Sid.* 434.

But an action upon the case does not lie against an attorney, for being attorney or solicitor in a cause, where he knew there was no cause of action. *R.* 1 *Mod.* 209.

(a) Note; yet it is the practice every day to do this, and no notice is taken of it.

[If

[If an attorney has papers of his client's, which may tend to convict him of forgery, and is served with *subpena* with a *duces tecum* of these papers, to appear before a grand jury, he ought not to appear and produce them, but immediately to deliver them up to his client. *Rex v. Dixon. P. 5 G. 3. 3 B. M. 1687.*]

[Ought not to take affidavits in a cause wherein he is attorney. *Barnes 192.*]

(B. 15.) How the Misdemeanor of an Attorney shall be punished.

By the *§. 4 H. 4. 18.* If an attorney be notoriously found in default of record or otherwise, he shall forswear the court, and never after be received in any court of the king.

And therefore, where an attorney sued out a *capias* without an original, he was struck out of the roll, and sworn, that he be not an attorney in any of the king's courts. *20 H. 6. 37. a. 2 Inst. 215. Cro. Car. 74. Lit. 46. 4 Inst. 101.*

So an attorney, who gave names to the sheriff to be returned upon a jury, was cast over the bar. *Mo. 882. 1 Brownl. 44.*

So where an attorney forges a *capias*. *Cro. Car. 74.*

Or permits another attorney, who was struck out of the roll, to practise in his name. *Sti. Pr. Reg. 3.*

Or enters a judgment contrary to the rule of the court. *Ibid.*

So if an attorney erase an *essoign*, &c. out of the roll, he shall be committed. *4 Inst. 100.*

Or falsify a writ, &c. *4 Inst. 101.*

If he takes money of his client, and afterwards wholly refuses to intermeddle with his business, he shall be struck out of the roll. *Mod. Ca. 187.*

If he refuse a re-delivery of writings entrusted to his perusal, though some concern himself principally, he shall be obliged to redeliver them. *R. Skin. 1.*

Or which were delivered to him by the order of another person. *R. 2 Mod. Ca. 340.*

* So where they are entrusted to his care, and he gives a receipt for them to redeliver them on demand. *Str. 621.**

* But if he deliver them to his own client, from whom he received them, to make an assignment, the other party cannot call upon him for them. *Str. 547.**

* But an attorney has a *lien* on his client's deeds, papers or money, for his bill. *Doug. 104, 105, 238.**

* And may obtain an order to stop his client from receiving money recovered in a suit in which he was employed for him, till his bill be paid. *Id. 238.**

* And the court will entertain a summary jurisdiction over an attorney of the court, in obliging him to deliver up deeds, &c. on satisfaction of his *lien*, though they came into his hands as steward of a court, and receiver of rents. *3 Term Rep. 275.**

* But if it appear that a third person is interested in the deeds, &c. the court will take a security from the person to whom they

they are delivered, to produce them on demand for the inspection of such third person. *Id. ibid.* *

If a man does a thing, which deserves his being struck out of the roll, it may be examined and determined in a summary way. *Per Holt, Mod. Ca.* 187.

So an action upon the case lies against an attorney, if another receives damage by his male practice, though he was punished for it. *4 Inst.* 102. *in marg.*

As if he sign a judgment before the rules expire, whereby the defendant cannot move in arrest of judgment. *Dub. Roy.* 194.

If he sue an *habere fac' seisinam*, or other execution against him, against whom no recovery appears on record. *4 Inst.* 102.

If he appear, or plead, without warrant. *Pr. Reg.* 7.

If he deliver an obligation, intrusted with him to be sued, to the obligor. *R. Lat.* 124.

And though the obligation was to several, he who delivers it to the attorney to be sued, may have the action for it alone. *Ibid.*

So the court will compel an attorney, upon motion, to do what he ought: As to deliver writings which he had as attorney. *1 Sal.* 87. upon payment of all due to him.

So upon payment of all due in the case for which they were delivered; for if the writings were delivered for a special purpose, he shall not detain them for another demand. *2 Mod. Ca.* 306.

So in an action by an attorney for fees in the same court, the court refers his bill to be taxed, upon bringing the money into court.

So if any part of the demand be for fees in the same court. *1 Sal.* 89.

Otherwise in an action for fees in another court, or by the executor of an attorney. *Ibid.*

So the court will award an attachment against him for male and fraudulent practice. *Sti. Pr. Reg.* 2.

And he shall pay costs thereupon. *Sti. Pr. Reg.* 2.

Or shall be committed. *Sti. Pr. Reg.* 3.

But an attachment shall not be granted before a day allowed for cause. *Mod. Ca.* 16.

By the *st.* 12 *G.* 29. if any, convicted of forgery, perjury, subornation, or common barrettry, act as an attorney, solicitor, or agent in any court, &c. the judges on complaint, or information, shall examine it in a summary way, and if it appear, &c. shall cause him to be transported, as felons are.

If an attorney in an inferior court use contemptuous words in court, he may be suspended. *1 Vent.* 331.

And shall not be restored, till submission. *Ibid.* * *1 Bl. Rep.* 222. *

[If an attorney for the plaintiff does not produce his client on summons from a judge, the court, on affidavit that no such man

as

as plaintiff can be found will order the attorney to pay costs. *Gynn v. Kirby, M. 7 G. Str. 402.*

[The court will not order plaintiff's attorney to produce his client, unless in a *qui tam* action. *Braceby v. Dalton, T. 11 G. Str. 705.*]

[By 12 G. 2. c. 13. §. 9. if an attorney commences suits while a prisoner, he shall be struck off the roll and the proceedings void, and any other permitting him to act in his name shall be struck off the roll.]

[But he may carry on suits commenced before his confinement.]

[Attorney in prison bringing action on bail-bond given after his imprisonment, on an action in which he was attorney before, is not within this statute, for it is only a continuance. Neither is defending suits within it. *Barnes 46, 263.*]

[If one takes affidavit of cause of action as an officer, and then acts as attorney for plaintiff, it is no ground for attachment. Had he acted as judge it would be ground for information. *Dodd v. Adcock, H. 9 G. 2. B. R. H. 211.*]

[The court will not bail an attorney committed the day before for a gross contempt extorting a bill of sale from one in custody, though the prosecutor consents, for the commitment is to be considered as a punishment. *Farrell's Case M. 12 G. 2. Andr. 298.*]

[The court will not grant an information against an under-sheriff for practising as an attorney, unless the particular acts he did are set forth. *Rex v. Bull, P. 18 G. 2. Wilf. 93.*]

[If attorney makes an affidavit unnecessarily long, the court will order the costs of it to come out of his own pocket. *In Canc. ex parte Smith, H. 1742. 1 Atkyns 139.*]

* So attorney, as well as his client, shall pay costs, if he joins in an affidavit to support a frivolous complaint, and make resentful declarations, which shew him to be personally active in it. *2 Bur. 654.**

[If the clerk in a commission of bankrupt does not attend, though served with *subpœna*, on indictment against the bankrupt for concealment, whereby he is acquitted; yet the chancellor will not interfere on petition, but leave the party to his remedy at law. *Ex parte Holliday, T. 1742. 1 Atkyns 209.*]

[A bill for agency cannot be taxed. *Anon. P. 23 G. 2. 1 Wilf. 266.*]

[If attorney does not charge defendant in execution, (which when he surrenders in discharge of bail after judgment, should be done the next term after surrender) whereby he is superseded, action for damages lies against attorney. *Russel v. Palmer, H. 7 G. 3. 2 Wilf. 328.*]

[But the court will not proceed against him in a summary way, unless in cases of gross negligence, ignorance, or blameable intention. *4 B. M. 2060. * 2 Bl. Rep. 780.**

[If attorney prevails on a man to become bail for his client, by verbal promise to save him harmless, and he is sued to execution on the bail-bond, yet the court will not interfere in a summary way, but leave bail to his action. *Beal v. Langstaff, H. 8 G. 3. 2 Wilf. 371.*]

[If

[If attorney does wrong in an inferior court, or *any where*, *quatenus* attorney, the court will interfere. *Evans v. P—*, T. 3 G. 3. 2 *Wils.* 382.]

[If he knows a case to be out of the jurisdiction of an inferior court, or goes beyond and out of the bounds of his duty as an attorney, he may be guilty as a trespasser. *Goodwin v. Gibbons*, T. 7 G. 3. 4 *B. M.* 2108.]

[If attorney sues out an illegal *Ca. Sa.* and causes defendant to be imprisoned thereupon, (as, against an administrator not guilty of *deceit*) trespass *vi & armis* lies against the attorney and his client. *Barker v. Braham*, H. 13 G. 3. 3 *Wils.* 368.]

[If attorney joins in affidavit with his client, to obtain an information against a justice of peace, and declares he will lay him by the heels, if it costs him 100*l.* and the complaint appears frivolous and vexatious, the court will order costs to be paid by both. *Rex v. Fielding*, M. 32 G. 2. 2 *B. M.* 654.]

[Attorney pleads two judgments fraudulently, without defendant's privity, he shall pay costs to plaintiff and defendant. *Barnes* 358.]

[Attorney in the country is answerable for the mistakes of his agent in town. *Barnes* 37.]

[Attorney is not punishable for letting judgment go for a just debt, though he has orders to plead. *Barnes* 38.]

[If there are many blunders in *capias*, he shall pay costs on both sides. *Barnes* 411.]

[If attorney puts in bail in a wrong court, whereby defendant's surety in bail bond becomes liable, he shall reimburse the bail; but not if he never practised in that court where action brought. *Barnes* 47.]

[In ejectment, rule to defend for two-thirds, and judgment for the rest: general judgment signed, and possession taken; part restored; but goods removed from tenant's house, and some not brought back. Goods shall be restored by affidavit, possession of two-thirds, and attorney pay costs of application. *Barnes* 191.]

[If an attorney, to favour his son (filazer of *S.*) takes out *testamentum ca.* from *S.* to *K.* instead of *K.* where it ought, proceedings shall be set aside, with costs against attorney. *Barnes* 419.]

(B. 16.) What Privileges an Attorney shall have.

[His privilege of exemption from offices, is the privilege of the court to which he belongs. *Mayor of Norwich v. Berry*, T. 7 G. 3. 4 *B. M.* 2109.]

Attorney, in respect of his attendance at the court, cannot be pressed for a soldier. *R. Cro. Car.* 11. *Off. Br.* 164, 174, 176.

[He shall have writ of privilege not to serve in the trained bands of London. *Barnes* 42.]

[An attorney in London is exempted from serving in the militia, either by himself or deputy. *Ervington's Case*, M. 14 G. 2. Str. 1143.]

*But

* But under the new militia acts, 30 G. 2. & 2 G. 3. c. 20. an attorney is not entitled to a writ of privilege, it not being under these acts a *personal* service, except in the exempted places, but a charge on property; the party having the liberty to commute the service by the payment of 10*l*. *Vide 2 Bl. Rep.* 1123, where this subject is discussed at length *

Nor, shall be made constable. *Cro. Car.* 389, 585. *Noy* 112. *Off. Br.* 160, 162. * *Doug.* 538. *

Though there be a custom, that every inhabitant shall be chosen in his turn. *R. Cro. Car.* 389.

Nor, shall be elected to any other office, against his will. *Cro. Car.* 11, 585.

As to the office of overseer of the poor. *Off. Br.* 162.

Or, churchwarden. *R. 2 Rol.* 272. *l.* 15.

To any office within a borough. *Off. Br.* 166, 174.

[He is exempt from serving sheriff of a corporation, though a corporator and resident, before and when admitted attorney. *4 B. M.* 2109. * *1 Bl. Rep.* 636. *

So he shall not be chosen collector of the lord's rent within a manor, where it is copyhold; though it be part of his tenure. *R. 1 Vent.* 16. 29. *Ray.* 179.

So he shall not be amerced for not doing his suit at the lord's court, when his attendance at *Westminster* is required. *Per Keeling*, 1 *Vent.* 29.

So he shall not be obliged to do watch and ward. *Off. Br.* 175. *Cont. per Jones*; for he may do it by deputy. *2 Rol.* 272. *l.* 25.

* Nor shall he be bound to obey a *subpoena* with a *duces tecum* of papers belonging to his client, in order to give evidence to a grand jury to prove his client guilty of having forged them. *3 Bur.* 1688. *

So an attorney in *B. R.* or *C. B.* may practice in any inferior court, unless he be excluded by act of parliament. *R. 1 Sid.* 410.

Though there be an usage to exclude all, not allowed by the steward. *Semb.* 1 *Sid.* 410. 1 *Vent.* 11.

So he may be bail, if he justifies. *2 Mod. Ca.* 338.

* But if objected to, he cannot justify. *Doug.* 466. *

* Nor can the clerk to defendant's attorney. *Id.* 467. *

* Nor can an attorney be lessee in ejectment. * *Id. Ibid.* *

And these privileges extend to attornies of *B. R.* as well as *C. B.* *Semb.* 1 *Rol.* 3. 1 *Vent.* 1. *Cro. Car.* 11. *Cont. Noy* 113. *Acc. Pr. Reg.* 6.

So, to attornies at large. 1 *Vent.* 1.

And if an attorney be denied his privilege, he may have a writ of privilege. *Cro. Car.* 11. 1 *Sand.* 67.

[His privileges (on a writ of privilege) shall not be discussed on affidavits. *Barnes* 37.]

And the writ of privilege for a suit shall have in it a *superjudeas.* *R. Dy.* 287. a.

And no *procedendo* shall be afterwards granted, as it may, where the privilege was only in respect of a priority of suit. *Dy.* 287. a.

So,

So, if he be refused to practice in a court, where *de jure* he may, he shall have an action upon the case. *R. 1 Sid. 410.*

But by a rule, *Mich. 1654.* an attorney shall not be allowed his privilege, if he has not attended his business for a year, except where he is hindered by sickness. *Vide Rules and Orders of C. B. 4.*

So an attorney has a privilege, not to be examined against his will to any facts he may have come to the knowledge of, by the confidence reposed in him by his client.

*But he is not privileged from giving evidence of collateral facts; therefore he may be obliged to prove his client having sworn and signed an answer in *chancery*, on which the latter is indicted for perjury. *Corwp. 846.**

*So, attorney for defendant may be compelled to prove an agreement attested by him, on which the plaintiff brought his ejectment. *Id. Ibid.*

So he has a privilege to be sued only in the court, where he is an attorney. (B. 17.)

*But where he lies by for a long time, he waves his privilege of suit. The privilege of suit.

1 *Bl. Rep. 231.**

And he ought also to sue in the same court. 1 *Mod. 118.*

He shall have privilege in a suit in an inferior court under 5*l.* *Dy. 287. a. in marg.*

In a suit by *qui tam*, &c. *R. 3 Lev. 398. Lut. 196. 1 Sal. 30, 543. Skin. 549.*

[If attorney is plaintiff, wherever he lays the venue it shall not be changed. *D. per Chapple, 7. Barnes 428.*]

[If he sues in person, he may lay his action, (even in assault) in *Middlesex. Barnes 479, 487.*]

[The action shall be retained in *Middlesex*, though the attachment was not a *testatum* out of *Middlesex. Barnes 493.*]

[Attorney sued, may change the venue from any place to *Middlesex. Wigley v. Morgan, T. 9 G. 2. Str. 1049. B. R. H. 285. Holliday v. Burges, P. 12 G. 2. Andr. 381.*]

[In *C. B.* he cannot. *Barnes 482.*]

[He may keep the venue in *Middlesex* when plaintiff, but not change it thither when defendant. This has been long the rule in *C. B.* and is now so settled in *B. R.* also. *Pope v. Redfearne, H. G. 3. 4 B. M. 2027.*]

[May change the venue to the county of which he is clerk of assize. *Barnes 489.*]

And if he sues and lays the action in *Middlesex*, the venue shall not be changed, though the cause of action arises in another county; for his attendance is required at *Westminster. 2 Vent. 47.*

Otherwise, if he waives *Middlesex*, and lays the action in *London*, or elsewhere. *Ibid.*

If an attorney sue an attorney of another court, or a scholar of *Oxford*, &c. the defendant shall not have his privilege. *Cro. El. 180. Dy. 287. a. in marg. *2 Bl. Rep. 1325.**

[If

[If plaintiff and defendant are both attornies, proceeding is by bill, not by attachment. *Ratcliffe v. Besley*, M. 14 G. 2. Str. 1141.]

[If attorney of B. R. sues attorney of C. B. who pleads privilege, the court will not determine on motion whether privilege takes away privilege. *Hetherington v. Lowth*, T. 3 G. 2. Str. 837.]

So, if an attorney be sued, he need not find special bail. 1 Vent. 1. 1 Mod. 10.

*But this is confined to the case of an attorney, sued in the court of which he is an attorney; for if an attorney of C. B. be arrested in B. R. he must find special bail, and plead his privilege. Str. 864. *Lord Raym.* 1567. *Vid.* 2 Bl. Rep. 1085.

So, if an attorney in C. B. be sued in B. R. by which he is supposed to be in *custod' mar'*, yet he may plead his privilege before he has allowed the jurisdiction of B. R. for his being in *custod' mar'* is by constraint. R. 5 Mod. 310. 1 Sal. 1.

[Attorney of C. B. actually in custody of the marshal of B. R. shall not be suffered to plead his privilege. *Windmill v. Cutting*, T. 5 G. Str. 191.]

[Attorney of C. B. arrested by *latitat*, must sue out his writ of privilege there, and plead it in B. R. *Snee v. Humphreys*, T. 24 & 25 G. 1. 1 Wilf. 306.]

[Attorney of B. R. arrested by *latitat*, shall be discharged on common bail. Motion of course. *Wheeler's Case*, H. 24 G. 2. 1 Wilf. 298.]

[Attorney may be sued in his court, for any sum, however small, notwithstanding statute for recovery of small debts. *Ibid.* *Barnes* 159.]

But he shall not have privilege, where the action is against him and his wife. Dy. 377. a. 1 Rol. 580. l. 45. *Adm. Cro. El.* 537. *Bro. Baron and Feme*, 9.

[Nor, if he sues in right of his wife, or joins with her in the action. *Drew v. Rose*, T. 11 G. 2 *Ld. Raym.* 1398.]

Or, jointly against him, and other defendants. *Per two J.* 1 Vent. 298. 20 H. 6. 33. a. Sal. 544.

Or by, or against him, as heir. *Semb. per Fitz.* Dy. 24. a. *Cont. per two J. in marg.*

Or by, or against him, as executor, or administrator. R. *Hob.* 177. *Cont.* after verdict. *Pr. Reg.* 8. *Cont. per two J.* Dy. 24. a. in marg. *Acc.* 1 *Brownl.* 47. R. *Sav.* 20.

Or, where he has absented himself from his practice for a long time. *Per Glyn*, *Pr. Reg.* 8.

Or, if he be sued upon a customary action; as, upon the custom of foreign attachment in London. R. 1 *Sand.* 68. *Vide Attachment*, (C.)

Or, in a suit by the king; as, an indictment or information. 3 *Lev.* 398.

Or, where the king brings the action. *Ibid.*

Or, if sued in the exchequer, as, accomptant to the king. R. 9 *Ed.* 4. 53. b.

[Plea

[Plea of privilege as attorney in *B. R.* received, after appearance and bail. *Upton v. Coward*, *T.* 1722. *Bunb.* 113.]

[If attorney sues by original, he waives his privilege. *Hetherington v. Lowth*, *T.* 3 *G.* 2. *Str.* 837.]

[He has no privilege, if he does not sue by attachment, and declare in person. *Barnes* 479.]

[If an attorney has left off practice, and is called *esquire*, he shall not be allowed privilege. *Maynard's Case*, *H.* 30 *G.* 2. in *B. R.* 2 *Wilf.* 232.]

[He has not privilege against being sued in the court of conscience in *London*. *Silk v. Rennet*, *M.* 5 *G.* 3. 3 *B. M.* 1583.]

*Nor, in that of *Westminster*. *Doug.* 381.*

*But the jurisdiction of the county court of *Middlesex* does not extend to attorneys. *Doug.* 381, 382.*

So he may waive his privilege, if he pleases. 1 *Vent.* *Vide* 2 *Vent.* 47.

*But not to delay the plaintiff by turning him round to sue in another court. 2 *Wilf.* 42.*

Or, if he be sued elsewhere he may plead it. *Vide in Abatement*, (D. 6)

But an action upon the case does not lie for suing him in another court, knowing that he had privilege. *R.* 1 *Mod.* 209.

If he waives his privilege, he cannot afterwards resume it: and therefore, after issue, or plea in an action against him in an inferior court, he shall not have a writ of privilege. *Dy.* 287. *a.* in marg.

Or, if a writ of privilege be awarded, a *procedendo* shall go. *Ibid.*

[If a sixty-clerk in chancery pleads privilege, it is not enough to alledge that he serves and intends to serve, &c. he must alledge that he is *actually attendant* on that duty. — *Goldsmith v. Baynard*, *P.* 4 *G.* 3. 2 *Wilf.* 288.]

An attorney upon a retainer may have an *assumpsit* for his fees. (B. 18) *Lut.* 31.

So he may have an action upon the case upon *assumpsit*, where he solicits a cause in another court. *Cro. El.* 760. *R.* *Hob.* 67. *For what causes he shall sue.*

1 *Rol.* 17. l. 15, 35. *R. Cro. Car.* 159, 194. *Jon.* 208.

So if a solicitor, or agent for another retain him, and promise him his fees, an *assumpsit* lies against the solicitor, or agent. *R. Skin.* 217, 218.

So an attorney may have debt for his fees. *Adm.* 2 *Cro.* 520.

So, where he is only a solicitor in another court. 2 *Cro.* 520. *Cro. Car.* 194. *R. Cont. Mo.* 366.

And debt lies against the solicitor, or agent, who retained him. *R.* 2 *Cro.* 520. *Dub. Cro. Car.* 107. 2 *Rol.* 77. *R.* 1 *Rol.* 594. *l. 10. Cro. Car.* 194. reports the same case *cont.* *Al.* 6. *Acc.*

Yet debt lies against him for whom he was retained. *R.* 1 *Rol.* 593. l. 45. *Cro. Car.* 194.

By

By the *st.* 3 *Jac.* 7. all attornies, and solicitors, shall give a bill of charges subscribed with their hand and name, before they charge their clients with any fees, or charges.

And to an action by an attorney, or solicitor, it may be pleaded, *that he has not delivered such a bill of charges.* *R. Ray.* 245.

But this stat. does not extend to an action by an attorney, upon a special promise. *R. Al.* 4.

Or, upon an *insimul computasset*; where it does not appear to be for his fees only. *R. Carth.* 57.

Nor, to an action for his fees, for removing a cause out of an inferior court by *habeas corpus.* *R. Carth.* 147.

When an attorney shall have an action for words, *Vide in Action upon the Case for Defamation,* (D. 24.)

(B. 1.)
How he
shall sue.

If an attorney commences an action, the first process shall be an attachment of privilege. *Lut.* 31.

A declaration by an attorney shall be, *in propria persona.* 2 *Sand.* 415. *Lut.* 343, 31.

So, a declaration by a clerk of a prothonotary. *Lut.* 69.

But if an attorney sue by original, he ought to declare in common form, and not upon his privilege. *R. 2 Lev.* 39. 1 *Vent.* 199.

Yet it is but form, and cured upon a general demurrer. *R. 2 Lev.* 39.

And he may declare by bill, or upon original, at his election. *R. 1 Vent.* 199.

To an action by an attorney for debt, or an *indebitatus assumpsit pro opere & labore, &c.* the defendant may plead *that no bill was delivered under his hand according to the st. 3 Jac. 7.* *R. 1 Sal.* 86. *R. Ray.* 245.

But that is no plea upon an *insimul computasset.* *R. Sho.* 48. 1 *Sal.* 86.

Nor to a special action upon the case. *R. Al.* 4. 1 *R. Sal.* 86.

Nor to an action by an attorney, for fees in an inferior court. *R. Sho.* 96. 1 *Sal.* 86.

*And now if a bill for business done in an inferior court be taxed there, and an action brought for it in *C. B.* it cannot be taxed by the prothonotary. *Barnes* 124.*

So the defendant may pray, that his bill may be referred to the prothonotary to be taxed, upon bringing the whole money into court.

By the *st.* 2 *G.* 2. 23. after a bill of fees delivered, on application to the court, or a judge of the court, where the business, or the greatest part thereof in value was done, by the party or any other authorized, and his submission to pay what shall appear due on taxation, the bill shall be referred, without the money being brought into court.

But till an action commenced, his bill could not be referred by rule. 1 *Sal.* 332.

Yet by the same *st.* 2 *G.* 2. 23. after 1st July 1729, no attorney or solicitor of the courts at *Westminster*, great sessions, or coun-

ties palatine shall commence an action for fees, &c. till a month after a bill of fees delivered to the party, or left at his dwelling-house, in *English*, and subscribed by such attorney, or solicitor.

* But if an attorney bring an action before the month, the court will not stay proceedings, for it must be pleaded, or given in evidence. *Barnes* 123.*

* The attachment of privilege is the commencement of the action, and the bill delivered must be before that. *Barnes* 461.*

* But if the bill has been delivered a month, and not referred for taxation, the defendant, in an action brought upon it, shall not be allowed to question the reasonableness of the *items* at nisi prius, nor before the sheriff. *Doug.* 198, 199.*

* And to entitle him to set it off in an action brought against him, it is not necessary that it should have been delivered a month, it being *sufficient* for that purpose, if it has been delivered long enough to have been taxed. *Id. Ibid.**

And such bill may be referred, though no suit be depending, &c.

And no suit shall be, during such reference, or taxation.

And if the attorney, or solicitor, or party chargeable, refuse to attend the taxation, the officer may tax the bill *ex parte*.

And, if the party pay what is due on the taxation to the attorney, solicitor, or any other authorized, who attends the taxation, or as the court shall direct, it shall be a full discharge; and in default of payment he shall be liable to an attachment, or such other remedy at the election of the attorney, or solicitor, as he was before liable to.

And if the attorney, or solicitor, appear to be overpaid, he shall refund, &c. or be liable to an attachment, or other proceeding at the election of the party, as he was before liable to.

If the bill be taxed at a sixth part less than delivered, the attorney or solicitor shall pay the costs of the taxation; if not so, the court at discretion shall charge the attorney, or client, in regard to the reasonableness, or unreasonableness of the bill. *Vid. Barnes* 118.*

[Attorney may retain money recovered by executor, to discharge money due for business done for testator. *Semb. Barnes* 38.]

[If attorney delivers his bill, and after his death it is taxed, and above a sixth part struck off, yet his executor shall not pay costs. *Weston v. Pool, M. 10 G. Str.* 1056.]

* And in case of an executor of an attorney, testator's bill need not be signed, nor are they liable to taxation by *§. 2 G. 2. Andr.* 276. *Barnes* 119, 122.*

[By 12 G. 2 c. 13. *§. 5.* attorneys may write their bills of fees with the usual abbreviations.]

[And the *§. 2 G. 2. c. 23.* does not extend to bills of fees between one attorney and another.]

* But agents bills may be taxed by the common law, independently of this statute, notwithstanding a case in 1 *Wilf.* 266. *Doug.* 200.*

[Attorneys and solicitors are entitled to a satisfaction for these expences, out of the fund, whether in the way of suit or prosecution,

cution, in lunacy or bankruptcy. *Ex parte Price*, T. 1751. 2 *Vexey* 407.]

[If a client has his attorney's bill taxed, he submits to pay, and cannot afterwards have an antecedent demand deducted out of it. *Anon. T. 1752.* 2 *Vexey* 451.]

[*C. B.* will not stay proceedings on motion, because a bill is not delivered, it is not irregular, but illegal. *Barnes* 36, 123, 243.]

[An attorney's bill for conveyancing cannot be taxed. *Barnes* 41.] **Doug.* 199.*

*But if part be for business done in court, and the rest for conveyancing, or parliamentary business, the master has power to tax the whole. *Doug.* 199.*

[After writ of inquiry executed, bill cannot be taxed. *Barnes* 124.]

[Nor after bill is paid. *Barnes* 46.—*Sed Q.* For after bill delivered, attorney accepted of less than the amount of the bill; afterwards bill was taxed, and above five-sixths of the money accepted, (but less than five-sixths of the bill) being allowed, client pays costs of taxation, and the surplus returned by attorney. *Barnes* 123.]

[Attornies, though of different courts, must sue each other by bill. *Barnes* 43, 44.]

[Attorney of *C. B.* may sue attorney of *B. R.* for a debt *bona fide*, by attachment of privilege, and he shall not have privilege. *Barnes* 44.]

[He must be sued in *qui tam* actions by bill. *Barnes* 48.]

If there has been judgment and inquiry, they will set them aside on costs, bringing money into court, general issue, and short notice. *Barnes* 243.]

[A client cannot move for a bill, and for taxation at one time; but first for a bill, and, when delivered, for taxation. *Barnes* 126.]

[If less than one sixth is deducted, attorney has not a rule for costs of taxation absolutely, but to shew cause; for it is in the discretion of the court. *Barnes* 147.]

(B. 20.)
How he
shall be
sued.

An attorney shall be sued by bill original, and not by writ. *Lut.* 228, 233. *Clift's Ent.* 572. **Doug.* 312, 314.*

*If he be sued by original writ, he cannot be discharged by serving the sheriff with a writ of privilege, but he must plead his privilege in abatement. *Doug.* 314.*

Though it be in ejectment, before the new rules, it shall be by bill, in nature of a writ of ejectment. *Dy.* 357. b.

The bill must be filed, though there is a consent to appear. *Sal.* 544.

And the bill may be filed against him, at any time within the term. *Mod. Ca.* 175.

But not after, or before, though it be upon the *effoign* day. *Mod. Ca.* 106. *Sal.* 544.

[If he is forejudged he shall not be sued by bill. *Barnes* 41.]

[If a second forejudger is obtained pending the first, it shall be set aside; he must be sued by original. *Barnes* 43.]

[If plaintiff, an attorney, sues defendant, an attorney, by *capias*, proceedings shall be stayed, though defendant has had time to put in bail. *Barnes* 53.]

But if defendant has appeared, proceedings shall not be set aside, but he may plead privilege. *Barnes* 424.]

[If attorney sues by writ of privilege, is nonsuited and taken on *ca. sa.* (for the costs) returnable on a general return, it is well. *Perrot v. Hele*, P. 10 G. 3. 3. *Wilf.* 58.]

The declaration ought to be against him *hic in curia*, and not (B. 21.) in *custod' mar.* 1 *Mod.* 10. 1 *Sand.* 28. Declara-

[If the declaration concludes, "and therefore brings suit," instead of, "*et pet' remedium*," it is good in *B. R.* though not in *C. B.* *Beer v. Alleyn*, T. 11 & 12 G. 2. *Andr.* 247.] tion.

He shall not give special bail. 1 *Mod.* 10. *Vide Bail*, (K. 3.)

To an action against him, an attorney ought to plead within (B. 22.) four days after the rules given. Plea.

So two rules may be given to an attorney within term to plead; and if he does not plead, there may be judgment the same term. 1 *Mod.* 8.

And rules may be given the same term, if the bill was filed four days before the end of the term. *Mod. Ca.* 175.

But if it was filed in the vacation, or only three days before the end of the term, he shall have four days to plead the next term after. *Ibid.*

The defendant being an attorney, must plead in proper person.

And if he appear in person and plead, and the entry be, *that he appeared at nisi prius by attorney*; it will be error. *R. 2 Cro.* 265.

Yet being but a misprision of the clerk, it may be amended. *R. 2 Cro.* 265.

If being present he refused to appear, except by attorney, there shall be judgment against him. 1 *Sid.* 134.

If an action be for a thing done without warrant, the defendant may plead, *quod retinuit, &c.* *Ashton's Ent.* 39.

Quod non fuit informatus de responso. *Cl. Aff.* 290. 1 *Bro. Ent.* 33, 4.

(C) Attorney for other Purposes.

(C. 1.) In what Cases there may be one.

SO a man may make an attorney for a special purpose: as, to make, or take livery. *Co. L.* 52. 2 *Roll.* 8. l. 25. *Vide Feoffment*, (B. 3.)

And in all cases, where a man has a power, as owner, or in his own right to do a thing, he may do it by attorney: as, *cestuy*

que use, after the *ft.* 1 *R.* 3. 1. and before 27 *H.* 8. 10. might dispose of his land by attorney. 9 *Co.* 75. *b.*

If a copyholder, or freeholder by custom, may convey his land by surrender, he may surrender by attorney. *R.* 9 *Co.* 75. *b.* 76. *a.* *Vide in Copyhold*, (F. 5.)

A man may execute a deed by attorney. 1 *Leo.* 36.

A copyholder may be admitted by attorney. *Vide in Copyhold*, (G. 8.)

A freeholder may do suit in his lord's court by attorney. *Vide in Copyhold*, (K. 15.)

If a man hire an horse, he may suffer his servant to ride upon him. 1 *Mod.* 210.

Or, borrow an horse for a certain time. *Per North*, 1 *Mod.* 210.

So a man may make an attorney, with a general power to sell all his lands, and goods. 1 *Sal.* 96.

(C. 2.) In what Cases there must be one.

And a corporation aggregate cannot act but by attorney. *Co. L.* 66. *b.*

In an action against them, they must appear by attorney: and if all the members appear by themselves, it is not sufficient: *Bro. Corp.* 28.

Must levy fines, or acknowledge deeds, by attorney. 1 *Leo.* 184. *Mo.* 591.

Yet they may acknowledge a deed in their chapter-house, before a judge, without an attorney. *R.* *Mo.* 676.

But if there be an uncertainty, as if they purchase a moiety of a carue of land in a waste, there shall first be an election of the place with the buttals, and then a letter of attorney to enter it. 1 *Leo.* 30.

A corporation may make a lease of land, and seal it, and then make a letter of attorney to enter and deliver the lease. *R.* 2 *Leo.* 97.

One of a body politic may be attorney for them. *Bro. Corporation* 4.

Vide Franchises, (F. 12.)

(C. 3.) In what Cases there shall not be any.

But a man cannot do homage, or fealty, by attorney; for it is personal. 9 *Co.* 76. *a.*

The lord may beat his villein, and if it be without cause, he cannot have any remedy; but the lord cannot authorise another to beat him, without cause. 9 *Co.* 76. *a.*

If a man give leave to *A.* to have his horse for him to ride to *York*, he cannot put his servant to ride upon him. *R.* 1 *Mod.* 210.

So a man, who acts only as attorney or deputy to another, cannot make an attorney to do it for him: as, a man who has an authority

authority or power to sell, to make leases, &c. cannot sell, &c. by attorney. 9 Co. 76. 1 Rol. 330. C. E.

So a man, who has but a bare authority, or power, cannot act by attorney. 9 Co. 76. a.

An executor who has an authority to sell, cannot sell by attorney. 1 Rol. 330. C.

So he, who has power to make leases, cannot make them by attorney. 1 Rol. 330. E.

So a man, who is enabled to do a thing by special custom, cannot do it by attorney, if it be not also warranted by custom: as, where an infant by custom may make a feoffment at 15 years. Co. 76. b.

(C. 4.) Who may be an Attorney.

Many persons have ability to act an attorney for others: as, a monk, infant, or alien, may make livery as an attorney. Co. L. 2. a.

So, a person outlawed, excommunicated, or attainted. Ibid.

So, a villein. Ibid.

So, a *feme covert*, to make livery to her husband. Ibid.

Or, the husband to his wife. Ibid.

So a man may be attorney for another, though he has an interest: as, he in the remainder shall be an attorney to give livery to the lessee for life. Ibid.

So a lessee for years, upon a feoffment by his lessor. Co. L. 2. a. R. 1 And. 246.

So a lessor may be attorney to make livery, upon a feoffment to his lessee for life. Co. L. 52. a.

Or, upon a feoffment by his lessee for years. Vide Co. L. 2. a.

Who may be an attorney for suits in law, or not. Vide ante, B. 1, 2.)

(C. 5.) How he shall be constituted.

An attorney ought to have a lawful warrant. Vide ante, B. 7.)

And regularly, his authority shall be by letter of attorney, or writ. Co. L. 52. a.

(C. 6.) Where he shall not prejudice himself.

If a man does nothing, but as attorney to another, he does not prejudice himself: as, if a lessee for years make livery as attorney to his lessor, his term is not merged. Co. L. 52. a. Mo. R. Mo. 280.

If the lord make livery as attorney to his tenant, he does not extinguish his feignory. Mo. 11.

[If an attorney by authority from his client or principal, signs an agreement for and on his behalf, to pay money, it does not
T t 2 make

make him, the attorney, liable. *Johnson v. Ogilby*, P. 1734. 3 P. W. 277.]

(C. 7.) When he shall be prejudiced.

But where a man, who acts as attorney, gives effect to his act, he himself shall be bound by it: as, if a lessor makes livery as attorney to his lessee for years upon a feoffment by him, he cannot afterwards avoid the feoffment; for the freehold, upon which the livery operates, passed from him. *Co. L. 52. a.*

If a man present to his own proper advowson, as attorney to another, and institution and induction follow thereupon, he will thereby be ousted of his possession. *Ibid.*

(C. 8.) Authority.

(C. 8.)
What shall
be a good
authority.

If a man appoints, and in his place constitutes B. to surrender a copyhold; it is sufficient, though he does not say, for him and in his name. *Dub. 1 Brownl. 94. Dan. 665.*

If he gives authority to B. to receive and recover his debt; he has power to make an arrest, &c. for that is necessary to be done before he can recover. *Dan. 665.*

And improper words, or a recital do not vitiate it. As, if a man by letter of attorney, reciting, *that by indenture he had demised, &c. appoints B. to deliver the lease*; it is good, though it was no indenture or demise, unless the lease was delivered before. *R. 1 Rol. 328. l. 15.*

But if the thing be mistaken in a letter of attorney, the authority is void: as, if a letter of attorney recites a charter 11 Sept. and gives power to receive livery *secundum formam charte prædictæ*, where the charter was 10 Sept. it is void. *Dan. 666.*

(C. 9.)
What only
a bare au-
thority.

If a man devise, *that A. and B. sell his land*, without devising the land to them; they have but a bare authority. *Vide Poar. (A. 1.)*

(C. 10.)
What an
authority
coupled
with an in-
terest.

But if a man devise land to A. and B. *to be sold*; they have an authority coupled with an interest. *Vide Poar. (A. 1.)*

(C. 11.)
How an au-
thority shall
be executed.
Strictly pur-
suant to the
authority.

An authority ought to be strictly pursued: and therefore, if there be an authority to A. and B. to do such an act; one of them alone cannot do it. *Co. L. 112. b. 181. b.*

Though one die, the survivor cannot do it. *Co. L. 113. a. 181. b. 1 And. 145.*

So, though one refuse. *Co. L. 113. a.*

So, if a man gives an authority to A. B. and C. *his executors* to sell after the death of D. and one dies before D. the others cannot sell. *Co. L. 112. b.*

So an authority to three *conjunctim & separatim*; two cannot do it. *Co. L. 181. b. 1 Rol. 329. l. 15.*

Or, to *A. and B. to sell by the advice of C.* if *C.* dies, *A.* and *B.* cannot sell. *Mo. 62.*

Or, if one declare an use, to such wife as his son shall marry, according to the advice and appointment of *A. B. C.* and *D.* if *A.* dies, the others cannot appoint. *Mo. 62, 493, 4.*

So an authority by commission, or other matter of record, shall be taken strictly, as well as an authority given by the deed, or will of the party. *Mo. 217.*

So, if a man does less, than his authority requires; it shall be void, generally. *Co. L. 258. a.* (C. 12.) Without doing less than the authority.

But he, who has an authority coupled with an interest, may do less than his authority: as, if a copyholder has a licence to lease for five years, he may lease for three years. *1 Rol. 330. l. 47.*

So, if a man act different from his authority, it is void: as, if an authority be to make livery, or do any other act, upon condition, and he does it absolutely. *Co. L. 258. a.* (C. 13.) And an act varying in substance from the authority, is void.

If authority be given by parliament to dispose, employ, and convert benefices appropriated for the augmentation of the incumbents there; leases for years to the incumbent are void; for the act intended an absolute disposal. *R. Mo. 42.*

If *A.* devise, that *B.* sell so much of his lands as is necessary to pay his debts; he cannot sell more. *1 Rol. 329. l. 21.*

So, if a man, who acts by the authority of another, and as his attorney, does it in his own name, and as his own proper act, it will be void; for he represents his master, and ought to do it in his name. *9 Co. 76. b. 1 Rol. 330. l. 35. Vide Copyhold, (F. 5.)* (C. 14.) Or done in the attorney's own name.

Or, at least, ought to express, that he does it as attorney to such an one. *9 Co. 76. b. 77. a.*

And therefore, if an attorney has a power by writing to make leases; if he makes a lease in his own name, it will be void. *9 Co. 77. a. 1 Rol. 330. l. 37.*

[If an attorney makes a lease in his own name, it is void; neither will it operate as a covenant, nor can action be maintained on it. *Frontin v. Small. 2 Ld. Raym. 1418. Str. 705.*]

If the king's surveyor has a power to make leases; and he makes a lease between the king of the one part, and *A.* of the other, and puts his own seal, it is void; for without the king's seal, it cannot be the king's lease. *R. Mo. 70.*

So, if an attorney, in his own name, makes a release upon composition being made of a debt. *R. Mo. 818.*

Yet a man, who has an authority, may act in his own name for the necessity; as, a devise, that *A.* shall sell; *A.* may sell in his own name; for the deviser is dead. *9 Co. 77. a. 1 Rol. 330. l. 40.*

So a deputy may act in his own name, as well as in the name of his principal. *1 Sal. 96.*

But

(C. 15.)
Where an
authority
need not be
strictly pur-
sued.

But now, by *ff. 21 H. 8. 4.* If executors have authority to sell land, and any of them refuse; the others may sell. *Co. L. 113. a.*

So, if one dies, the survivor may sell. *R. Cro. Car. 382. Cont. 1 And. 145. Mo. 62. R. Sav. 73. R. acc. 2 And. 59.*

So, if one devises to *A. B. and C. in fee to the intent to sell*, and makes them executors, and *A.* refuses; *B. and C.* may sell. *R. Cro. El. 80.*

So it is sufficient, if the words and intent of the authority are generally pursued: as, if a man devise land to *A. for life, and afterwards to be sold by his executors*, generally, if one of the executors dies before *A.* the others may sell. *Co. L. 112. b. 113. a. 1 And. 145.*

If an authority be *ad recuperandum his debt*, he may arrest the debtor; for it is one mean for the recovery. *R. Pal. 394.*

If a devise be, *that his sons in law sell his land*; if one dies, and two survive; the survivors may sell. *Mo. 147. Cro. El. 26. 1 Leo. 285. 3 Leo. 106. 1 Rol. 328. l. 35.*

If there be a warrant to five bailiffs upon a *ferri facias, conjunctim & divisim*; execution by two, or three, will be well. *R. Pal. 52. 1 Rol. 329. l. 5. 2 Rol. 137. Noy. 47. R. Cro. El. 913. 3 Bul. 210. 1 Rol. 406. Yel. 25. Hutt. 127. Co. L. 181. b.*

So, if an authority be coupled with an interest, it is not so strictly taken: as, if land be devised to executors to be sold; the survivor shall sell. *Co. L. 113. a. 181. b.*

So, if an authority be directory to do a ministerial act, it need not be taken strictly: as, if the king direct the deputy and council of *Ireland* to cause a bishop to be installed, &c. and the deputy be changed; the successor, and the council may do it. *Pal. 27.*

If the king gives authority to the treasurer, chamberlain and sub-treasurer, or any of them, to pay such a sum, and to pay it, it is well. *1 Rol. 328. l. ult. Dub. 11 Co. 92. a.*

So an authority may be executed in part at one time, and in part at another: as, if land be devised to be sold; it may be sold part at one time, and part at another. *Co. L. 113. a.*

If there be a feoffment with a letter of attorney to make livery they may make livery for part at one time, and for other part at another time. *R. Mo. 280.*

So, if a man does all that his authority warrants, and more it is well executed.

So, if the king accepts a judgment in satisfaction of a debt proviso that the barons of the exchequer, or two of them, do not revoke it, if three revoke it, it is within the proviso. *1 Rol. 328. l. 42.*

So, if he does all that the law requires, the authority is well executed, though the direction of the party is not strictly pursued: as, if a man has an authority to enter into land; if he comes near as he can for doubt of death or mayhem, and makes claim it is sufficient. *Co. L. 258. a.*

If a copyholder for life have licence to make leases for five years if the copyholder so long live; and he makes a lease for five years generally; it is sufficient, for it determines by his death. *R. 1 Rol. 331. l. 5.*

If upon a feoffment of 20 acres there is a letter of attorney to make livery accordingly, and 19 acres are evicted; if he makes livery of the residue, it is sufficient. *Mo. 280.*

So a circumstantial variance in the execution of an authority is not material. *1 Sal. 96.*

Attorney General.

Vide Information, (A. 1.)

A U D I E N C E.

Court of Audience.

Vide Courts, (N. 4)

A U D I T A Q U E R E L A.

(A) When it lies.

AN *audita querela* lies for a man in execution or in danger of it, upon a judgment, statute merchant, staple, or recognizance, when he has matter in fact, or in writing, to avoid such execution, and no other means to take advantage of it. *F. N. B. 102. H.*

As, if *B.* be taken in execution upon a statute acknowledged by *A.* in his name. *Ibid.*

If the land of *B.* be recovered by the collusion of *A.* who appears as tenant, and makes default. *F. N. B. 103. A.*

So, if execution be sued upon a statute before the time; the conuzor shall have an *audita querela*, though the condition be afterwards broken. *1 Rol. 307. l. 20.*

Or, upon a statute taken without authority, or not duly sealed. *R. Cro. El. 233.*

Or, by duress. *1 Ch. R. E. of Oxford 9.*

So, if upon a statute there be an extent against one terre-tenant, and not against the others; the coruzee shall have an *audita querela* quare the land of the others *similiter extendi non debet*; or the terre-tenant shall have it to avoid the extent intirely, and shall have restitution *cum exitibus & dampnis*. *Semb. Mo. 535.*

So, if upon a joint and several obligation, one of the obligors be sued in *B. R.* and taken in execution; and the other in *C. B.* and his lands taken in execution by *elegit*. *R. Hob. 2. R. 2 Bul. 97.*

So,

So if the conuzee of a statute sue execution against one feoffee, &c. of the conuzor, he shall have an *audita querela*. *Jon.* 90.

If upon a joint trespass by *A.* and *B.* there be a recovery against *A.* in *C. B.* upon a declaration in *London*, and against *B.* in *B. R.* upon a declaration in another country, and *A.* pays the whole; *B.* after he is taken, shall have an *audita querela*. *R. Jon.* 378.

So if a man pay a judgment, and afterwards is taken in execution, though he has no writing for the payment. *Per 3rd Judg. Poph. cont. R. 2 Cro.* 29. *1 Ch. R. E. of Oxford* 9.

Or if a letter of attorney was given to acknowledge satisfaction, which is lost. *1 Ch. R. E. of Oxford* 9.

If judgment was confessed upon an usurious contract. *1 Ch. R. E. of Oxford* 9.

Or obtained by covin. *Ibid.*

Or against an infant, inveigled to be bail. *Ibid.*

If after judgment, and error thereupon, the plaintiff releases all executions, yet affirms the judgment, and takes out execution upon it. *Semb. 1 Rol.* 11.

If two defendants are in execution, and one escapes, for which the plaintiff recovers and has satisfaction against the sheriff; the other shall have an *audita querela*. *R. 2 Mod.* 49.

If a conuzor being in execution marries the conuzee. *Mo.* 57.

Or purchases a manor, to which the conuzee is a villein regardant. *Mo.* 57.

An *audita querela* is only a commission to the justices to examine.

And is in nature of trespass; for damages are given, if the execution be without right. *2 H. 4.* 17. *b.*

And it commenced 10 *Ed.* 3. *Ray.* 89.

[*B. R.* directed one taken on an escape warrant on a Sunday, to bring *audita querela*, because *C. B.* thought a man could not, and *B. R.* that he could be taken on a Sunday. *James v. Parson.* *Fort.* 374. Q. How determined.

(B) At what Time.

AN *audita querela* lies, *quia timet.* *Co. L.* 100. *a.*
And therefore, the conuzor in a statute shall have it before execution sued. *1 Rol.* 306. *l.* 8.

Or before a suit commenced upon the statute. *1 Rol.* 306. *l.* 12.

So may the heir of the conuzor. *1 Rol.* 306. *l.* 8, 12.

So if judgment be against three, and one is taken in execution; they shall all have an *audita querela*. *R. Jon.* 378.

But a purchaser under the conuzor of a statute, &c. shall not have an *audita querela* before execution sued against him. *1 Rol.* 305. *l.* 45, 50.

So the defendant himself shall have an *audita querela*, upon a release to him by the plaintiff after verdict, and before the day in bank, till there be judgment against him; for perhaps the plaintiff will never enter up his judgment. 1 *Rol.* 306. l. 17.

Yet if there be judgment against *A.* in *C. B.* in trespass, and against *B.* and *C.* in *B. R.* for the same trespass, and *A.* pays all the damages against him, and afterwards execution is sued against *B.* he and *C.* may join in an *audita querela*, though *C.* is not yet aggrieved; for he is privy to the judgment against *B. R.* *Jon.* 378. *Cro. Car.* 443.

(C) When it does not lie.

BUT where the party had time to take advantage of the matter, which discharges him, and neglects it, he cannot afterwards be helped by an *audita querela*. 1 *Rol.* 306. l. 30. *Ray.* 89. *D.* 1 *Sid.* 43.

As in a *scire facias* upon a judgment, if the sheriff returns *scire feci*, and there be judgment thereupon, the defendant shall not have an *audita querela*, if he had a release after the first judgment; for he had time to plead it upon the return of the *scire facias*. *F. N. B.* 104. l. 1. 1 *Rol.* 306. l. 40. *R. Ray.* 19. * 1 *Wils.* 98.*

Otherwise, if the sheriff return *nichil*. *F. N. B.* 104. l. 1. *Ray.* 19.

So in a *scire facias* upon a recognizance, if the sheriff returns him warned, the defendant shall not have an *audita querela*, because he has performed the condition, &c. 1 *Rol.* 306. l. 32. *Dan.* 632. *Adm.* 1 *Sal.* 264.

Nor for other cause, which he might have pleaded to the *scire facias*. *R. Mo.* 536.

So none shall have an *audita querela*, who is not the party grieved: As if execution upon a statute, &c. is sued against one purchaser only, who afterwards sells to *B. B.* shall not have an *audita querela* against the other purchasers. *R. 2 Bul.* 17. *Jon.* 90. *Semb. Mo.* 662.

If there be an extent upon the land of *B.* who afterwards sells to *A.* he shall not have an *audita querela*. *Dub.* 2 *Cro.* 227.

So a man shall not have an *audita querela*, where the matter alleged does not discharge him: As if two obligors are in execution, one dies or escapes the other shall not have an *audita querela*; for it is no discharge to him. *R. 5 Co.* 86. b.

If *A.* be in execution upon a judgment in debt, upon a single bill, the defendant shall not have an *audita querela* upon a suggestion of payment without an acquittance. *R. 1 Bul.* 140.

Nor upon matter suggested contrary to a verdict: As if in *assumpsit* for the hire of a ship lent to him, there be a verdict for the plaintiff, the defendant shall not have an *audita querela*, upon a surmise that the ship belonged to the *Muscovy* company. *Sav.* 70.

So

So a man shall not have an *audita querela*, to take advantage of his own wrong: As if a prisoner break prison and be retaken, he shall not have an *audita querela*, though the execution was discharged by the escape. *R. 3 Co. 44. b. R. 3 Co. 52. Semb. cont. Mo. 57. R. acc. Mo. 257.*

So a man need not have an *audita querela*, where the matter by which he finds himself aggrieved, is void: As if an extent be sued against him, without any right. *1 Rol. 304. A. Pal. 274.*

(D) When there may be an Audita Querela, or other Remedy at Election.

YET sometimes a man may have an *audita querela*, or other remedy, at his election: As upon execution against the issue upon a statute acknowledged by the tenant in tail; he may have an *audita querela*, or an assise. *1 Rol. 304. l. 25. 305. l. 20, 22.*

If a conuzee sue execution against one feoffee of the conuzor only, when there are several; he shall have an *audita querela*, or a *scire facias*. *R. Jon. 90.*

But if a man be discharged of an execution by an *audita querela*, where there is a double vexation, as if there be two obligors, and one is taken upon a *capias ad satisfaciendum* in one suit, and the lands of the other in another suit, he shall not be retaken, though the lands are afterwards eyicted. *Hob. 2. Vide 2 Bul. 97, 101.*

So where a man has cause of relief, which is not a matter of fact that need be tried, the court usually helps him upon motion, without putting him to his *audita querela*. *1 Sal. 264. * 1 Ld. Raym: 439.**

[If defendant taken in execution, on judgment revived by two *scire facias*'s and *nichils* returned, moves for discharge on producing release from testator; if there is any doubt of its execution, the court will not relieve on motion, nor compel plaintiff to try it by feigned issue, but leave defendant to his *audita querela*. *Misford v. Cordwell, M. 17 G. 2. Str. 1198.*]

(E) How the Proceeding shall be.

(E. 1.) The Process.

IN an *audita querela*, the process is a *venire facias, distringas, alias, pluries*, and if *non est inventus* be returned, or that he has nothing, the plaintiff shall have a *capias* against the defendant. *F. N. B. 104. U. Dy. 297. b.*

And if the plaintiff be in execution, a *scire facias* goes; if not, a *venire*. *R. Mo. 811. 1 Sal. 92.*

So if the *audita querela* be founded upon a record. *1 Sal. 92.*

And

And if there be a default by the defendant upon a *scire feci*, or two *nichils* returned, the plaintiff shall have judgment. 1 Sal. 93.

But where an *audita querela* is sued *quia timet*, and the party is at large, there shall never be a *scire facias*. R. 1 Sal. 92.

(E. 2.) Out of what Court it shall be.

An *audita querela* shall be granted out of the court, where the record upon which it is founded, remains, or returnable in the same court. F. N. B. 105. B.

And therefore, if a man recover in B. R. or C. B. the defendant having a release after judgment, and before execution, shall sue the *audita querela* out of B. R. or C. B. where the record is. F. N. B. 105. b.

So if a recognizance be acknowledged in C. B. and execution be sued upon it after release, the defendant shall sue the *audita querela* out of C. B. F. N. B. 105. B.

And such *audita querela* out of the rolls of the same court is judicial. F. N. B. 105. B.

Yet it may be original, and upon a judgment in C. B. it goes out of *chancery* returnable in C. B. F. N. B. 105. B.

So upon a statute merchant, or staple, an *audita querela* issues out of *chancery*; for execution cannot be sued till the statute comes into *chancery* by *mittimus*. 1 Rol. 383. 1 Rol. 311, l. 42.

And therefore, in such a case there cannot be an *audita querela* out of C. B. though the *capias* upon the statute be returned there, F. N. B. 104. S.

But it may be returnable in C. B. F. N. B. 104. S. or in B. R. R. Cro. El. 208.

So it may be returnable in *chancery*, for the recognizance remains there. 2 Bul. 10. 1 Rol. 383.

But an *audita querela* cannot be granted out of any court returnable in the same court, where the record upon which it is founded is not there.

And therefore, an *audita querela* upon a judgment in B. R. returnable in *chancery*, is bad. R. 2 Bul. 10. R. 1 Rol. 383. 1 Rol. 311. l. 40. Mo. 850.

And if the record be not brought into the court where the *audita querela* is sued, there shall be judgment against the plaintiff. Cro. El. 33.

So an *audita querela* shall not be allowed at the suit of several persons upon several executions. R. Mo. 354.

Yet it is sufficient that the tenor of the record be in the court where the *audita querela* is sued: And therefore, if there be a judgment in York, and the record be removed by *certiorari* in *chancery*, and thence by *mittimus* in B. an *audita querela* lies in B. upon this judgment. Bro. Audita Querela, 20.

So an *audita querela* lies in C. B. after a writ of error in D. R. Ayl. Ent. 141. Dan. 640.

So an *audita querela* lies by an infant upon a statute, before it be certified in any court. *Dan.* 640.

(E. 3.) Allowance of the Writ.

The writ of *audita querela* shall be allowed only in open court.
1 *Bul.* 140. 2 *Bul.* 97. 2 *Sbo.* 240.

And therefore, when the curfitor has wrote the writ, an *allocatur* shall be indorsed by the secondary in court. *Vid. Introduction*, 5.

So if it be irregularly granted, a *vacat* shall be entered upon the record. *Mo.* 354.

And if bail also be given, it shall be discharged. 1 *Bul.* 140.

(E. 4.) Bail.

If a man be in execution, and brings an *audita querela*, he may find surety in *chancery corpus pro corpore*, to have him in *chancery* such a day, and there to pay the sum, if he does not prove it discharged by release, &c. *F. N. B.* 105. *F.*

And now by the *st.* 11 *H.* 6. 10. For that the surety found in *chancery* was only to the king, which the king might pardon, the recognizor in a statute staple shall be bound as well to the party, as the king.

And therefore, he ought to find surety in *chancery* to the king and to the party severally, in certain sums. *F. N. B.* 105. *F. Tel.* 59.

And if there be surety that the plaintiff shall be in *chancery* such a day, *ad standum juri in hac parte*, and that the plaintiff shall prosecute with effect; this imports, that the surety pay the condemnation, if the plaintiff does not pay it, nor prosecute with effect. *R. Tel.* 59. 2 *Cro.* 67. 1 *Rol.* 336. *l.* 45.

And therefore, in a *scire facias* against the sureties, it is a good breach, that they did not pay. *R. Tel.* 60. 2 *Cro.* 67.

Bail shall be found, that the plaintiff do appear at each day given by the court, and prosecute with effect, and if the judgment be affirmed, the bail shall render him to prison, or pay the condemnation. *Mo.* 299.

If there be judgment against the plaintiff in an *audita querela*, who surrenders himself in discharge of his bail, he shall be in custody upon the first execution. *Sal.* 582.

In all cases it is usual, that the plaintiff in an *audita querela* be bailed, if he shews matter in writing for his discharge, and the defendant be demanded, whether he can gainfay it. 1 *Rol.* 133, 384. 2 *Rol.* 113. *l.* 5.

So if he alledges payment, and has an *affidavit* of it. *Semb.* 1 *Rol.* 384. 2 *Cro.* 29.

So if he alledges other matters in fact: As usury, &c. *Semb.* 2 *Cro.* 67. *Cont. per Co.* 1 *Rol.* 133, 384. *Cont.* 2 *Rol.* 113. *l.* 10. *D.* generally, 1 *Sid.* 286.

So

So if he alledges infancy, after inspection he shall be bailed.
 2 Rol. 113. l. 20.

And bail shall be allowed in open court. 1. Bul. 140.
 Lat. 113.

Yet if the plaintiff be in execution, he shall not be bailed till the defendant plead. Compl. Att. 214.

So there shall not be bail upon articles produced, which do not amount to a discharge, but an agreement that he shall be discharged. R. 2 Cro. 218. Vide post, (E. 5.)

(E. 5.) Superfedeas.

If an *audita querela* be founded on a writing, and the plaintiff be not in execution, after proof of the deed in court, and bail given, the plaintiff, upon motion, may have a *superfedeas*. Vid. Introduction, 5. 1 Sal. 92.

And if the writ abate, upon a second writ purchased he may have another *superfedeas*. F. N. B. 104. R.

So if the plaintiff be not in execution, there is no need of bail; for it is only requisite when he is discharged. Jon. 378.

But if the plaintiff be in execution, there shall be no *superfedeas*. Com. Att. 214.

Nor unless the *audita querela* be founded on a writing. Vid. Introduction, 5.

Or if the plaintiff be nonsuited, and afterwards sue another writ, he shall not have a *superfedeas* in the second writ. F. N. B. 104. O.

So an *audita querela* is no *superfedeas*, till a *superfedeas* be sued. 1 Sal. 92.

So if a *superfedeas* be granted upon the process of *venire facias* before bail found, it shall be quashed as irregular. 2 Sho. 239, 240.

So the writ shall not be allowed, nor a *superfedeas* thereupon, unless the release, &c. upon which it is founded, be proved by the witnesses present in court. 1 Sid. 351.

(E. 6.) Declaration.

In the declaration in an *audita querela*, the better form is, that the plaintiff recite the whole record of the recovery; or *quod cum quidam A. nuper scilicet, &c. implacitasset quendam B. &c. super quo* he found bail, *taliterque in eadem curia nostra processum fuit, quod predictas A. recuperet, &c.* Co. Ent. 87. b. c.

If there be an *audita querela*, to be aided against a recognizance, statute, &c. the declaration ought to shew the defeazance. Dy. 297. b.

A variance between the *audita querela* and the record abates the writ. F. N. B. 104. R.

So if the plaintiff recites the whole recovery, and then the finding of bail in *placito predicto*, by which it does not appear to be found *pendente placito*, it is bad. Co. Ent. 87. b.

So

So if there be a *capias* against the principal, and then a *capias* against the bail, without a *scire facias*, it is bad. *Co. Ent.* 87. *b.*

*But where there is an *audita querela* by two, the death of one shall not abate the writ, for the survivor is not to be restored to any thing he has lost, but to discharge himself of the execution; and thereupon, notwithstanding the death of the other, he may proceed for a discharge *in toto* for himself. *Vent.* 34. 3 *Mod.* 249.*

The declaration ought to comprehend only one *gravamen*, or at least, if it mentions several, it ought to rely upon one only; otherwise it will be double. *F. N. B.* 104. *R.* *Cro. El.* 809. *Dy.* 297. *b.*

And the plaintiff ought to shew himself to be aggrieved. *F. N. B.* 104. *P.*

But if the plaintiff says, *That he was tenant of a messuage, and the conuzee sued execution against him only, ad grave dampnum*; this is sufficient to shew, that he was tenant at the time of the execution, after verdict for the plaintiff. *R. Lat.* 112. *Jon.* 90. 3 *Bul.* 308, 309.

So if he says, *that the land was delivered upon a liberate*; it is a sufficient averment that the plaintiff was ousted.

And it is enough that the declaration shews a sufficient *gravamen*, though it be defective in the matter alledged for aggravation of damages: As if the plaintiff alledge, *that one conuzor was in execution, and escaped, and that afterwards the conuzee the lands of the plaintiff the other conuzor eidem C. deliberavit* where it ought to be, *by the sheriff deliberari procuravit*; for this is only for aggravation, the escape being matter sufficient for his discharge. *R. Cro. Car.* 153.

Vide Pleader, (2 W. 40.)

(E. 7.) Judgment.

If the defendant does not plead, after a *scire facias*, and two *nichils*, there shall be judgment against him.

But if the judgment be after one *nichil*, it is error. *R. Tel.* 88.

If the defendant pleads, and afterwards makes default upon the *scire facias ad audiendum judicium*, there shall be judgment against him.

If there be judgment for the defendant in an *audita querela*, before he have execution upon his first judgment, he may afterwards pursue his execution upon that. 1 *Vent.* 264.

If the defendant in the first judgment was in execution before the *audita querela*, and in that there is judgment for the defendant, he shall pursue execution upon the judgment in the *audita querela*. 1 *Vent.* 264.

A U D I T O R.

Auditors in Accompt.

Vide Accompt, (E. 7, &c.)

Auditors of the Exchequer.

Vide Courts, (D. 14.)

A V E R A G E.

Vide Chancery, (2 L.)

A V E R D U P O I S.

Vide Leet, (L. 7.)

A V E R M E N T.

Vide Pleader, C. 50, &c.—E. 33.—(Action upon the Case for Defamation, G. 8, 9.)—Action upon Statute, (A. 3.)—Amendment, (Q.)—Bargain and Sale, (B. 10.)—Devise, (N. 25.)—Record, (E.)—Retorn, (G.)

A U L N A G E.

Vide Trade, (C. 5.)

A V O I D A N C E.

Vide Advowson, (C. 2.)—Esglise, (N. 1. &c.)

A V O W R Y.

Vide Costs, (A. 4.)—Pleader, (3 K. 13, &c.)—Temps, (G. 14.)

A U R U M R E G I N Æ.

Vide Roy, (F. 2.)

A U T H O R I T Y.

Authority of an Attorney.

Vide Attorney, (B. 9, 10.—C. 8, &c.)

Autho:

Authority of Justices of Peace.*Vide Justices of Peace, (A. 8.—B. 1, &c.)***Authority of Law.***Vide Imprisonment, (H. 4, &c.)***Authority of the Pope.***Vide Justices, (K. 9.)—Popery, (A. 1.—B. 4.)***Authority of a Sheriff.***Vide Viscount, (C. 1, &c.)***Authority of a Visitor.***Vide Visitor.***AUTREFOITS ACQUIT.***Vide Appeal, (G. 11.)***AUTREFOITS CONVICT.***Vide Appeal, (G. 9.)***A W A R D.***Vide Arbitrament.—Chancery, (2 K. 1, &c.)***B A I L.****(A) Bail; what shall be.**

BA I L signifies a guardian, or keeper, &c. 4 *Inst.* 178.
 A man bailed is, where any one arrested or in prison, is delivered to others, as his bail, who ought to keep him to be ready to appear at a time assigned, or otherwise to answer for him.

And therefore, the bail may keep the person committed to them in their custody, for their indemnity. 4 *Inst.* 178, 179. Or

Or if he be at large, they may reseize him, and bring him before a justice to find new bail, or to be committed to prison. *Hal. P. C.* 96.

And this they may do upon a sunday. *Mod. Ca.* 231. *Vide in Temps.* (B. 3.)

So they may detain him in the compter, &c. till by *habeas corpus* he can be turned over to the proper prison. *Mod. Ca.* 247.

And if he be charged with a debt of the king in the compter, this does not hinder his commitment to the proper prison, though the king opposes it. *R. Mod. Ca.* 247.

(B) Mainprize; what shall be.

MAINPRIZE is, where any one takes upon him to be surety for another. 4 *Inst.* 179. *Hal. P. C.* 96.

And therefore every bail is mainprize, but every mainprize is not bail. 4 *Inst.* 179.

For a man may be mainperned, who never was arrested, or in prison. *Ibid.*

As in an appeal of felony, if the defendant wage battle, the plaintiff shall find mainpernors for his appearance, though he was not in prison. *Ibid.*

So if a man be mainperned in *B. R.* another cannot file a bill against him, as he may where he is bailed. 4 *Inst.* 180.

So if a man in execution sue an *audita querela*, or a *scire facias* upon a release, &c. he shall find mainpernors, and not bail, because he is the plaintiff. 4 *Inst.* 179.

If mainprize is refused by the sheriff, &c. when it ought to be allowed, a writ *de manucapione* lies. *F. N. B.* 250.

Or he may have a writ out of *chancery* directed to the sheriff, &c. to bail him. *Ibid.*

(C) Pledge; what shall be.

A Pledge is he who undertakes, or is surety for another. 4 *Inst.* 180.

And therefore, every bail and mainprize, *stricte loquendo*, is a pledge. 4 *Inst.* 180.

But a pledge is such as the demandant or plaintiff finds, where the writ says, *Si querens fecerit te securum de clamore suo prosequendo*, for then the plaintiff shall find pledges for the security of the king's amerciamment, if the plaintiff be nonsuited. 4 *Inst.* 180.

When pledges shall be found, and how, *vide in Pleader*, (C. 16.—3 K. 5.)

So by the *st. W.* 2. 2. there shall be pledges *de rotorno habendo*. *Vide* 2 *Inst.* 340. 4 *Inst.* 180. *Vide Pleader*, (3 K. 5.)

So pledges are said to be those who voluntarily are surety for another. 4 *Inst.* 180.

As in *Magna Charta*, c. 8. *Plegii debitorum non respondeant quamdiu capitalis debitor sufficiat.* 2 *Inst.* 19.

Pledges are those who plevy other things than the body of a man. 2 *Inst.* 19.

(D) Caution; what shall be.

SO in the spiritual court, *caution* shall be given. And it is *juratory*, when a man makes oath in small offences *stare mandatis ecclesiæ.* 2 *Lew.* 36.

Fide-jussary, when he gives an obligation with sureties to do so. *Ibid.*

Pignoratitia, when he gives pledges for the same intent. *Ibid.*

But an obligation can be taken only upon a writ *de cautione admittendâ.* *Ibid.*

(E) Surety; what shall be.

SURETY is a general word, which comprehends all the former. 4 *Inst.* 180.

And it shall be given by the common law, or by *statute.* 4 *Inst.* 180.

By the common law, upon a writ of *ne exeat regnum.* *Vide* 2 *Inst.* 40, 41.

Upon a *supplicavit* for the peace. *Vide* *Forcible Entry*, (D. 16, 17.)

So by the *st.* 34 *Ed.* 3. 1. upon default of good behaviour.

(F) What Persons are bailable.

(F. 1.) In Criminal Cases.

(F. 1.)
By the common law.

IN criminal cases, all persons were bailable by the common law, except for homicide. *Hal. P. C.* 97. 2 *Inst.* 42.

And the case of homicide was introduced by *statute.* 1 *Inst.* 186, 189.

If any one was indicted of felony, by an inquisition *ex officio* before the sheriff, bailiff of an hundred, &c. as he might be till restrained by the *st.* 28 *Ed.* 3. 4. and the sheriff refused to bail him, a writ *de manucapione* lay to the sheriff, &c. *F. N. B.* 250.

But an obligation for the enlargement of a man taken for treason, was void by the common law. *R.* 1 *Lew.* 209.

Or for ease and favour to any one in execution for debt. 1 *Lew.* 209.

(F. 2.)
Who are not bailable by the *st.* *W. 1.* 15.

But now, by the *st.* *W. 1.* 3. *Ed.* 1. 15. *Sheriffs or others* *concerns the king.* 2 *Inst.* 189. *Hal. P. C.* 98.

Of counterfeiting the king's seal. 2 *Inst.* 188. *H. P. C.* 98.

Of falsifying money. 2 *Inst.* 188. *H. P. C.* 98.

Which were treasons by the common law, and since declared so by the *st.* 25 *Ed.* 3. 1. 2 *Inst.* 188.

And it seems to comprehend all offences there declared to be treason.

Nor persons taken by command of the king, or his justices, or justices of his forest.

A person committed by the personal command of the king, though it be illegal, can be bailed only in the superior courts at *Westminster.* 2 *Inst.* 187.

(2) *Nor persons accused of arson feloniously done.* *H. P. C.* 98. 2 *Inst.* 188.

(3) *Of the death of a man*, which is mentioned by the *st.* *W.* 1. 15. as an offence known not to be bailable before. 2 *Inst.* 186.

And therefore a man is not bailable for murder. *H. P. C.* 98.

Nor for manslaughter, or se defendendo, if he confesses the fact upon his examination. *H. P. C.* 99.

Or if he be taken with the manner, so that it is apparently known that he killed another. *H. P. C.* 99. 1 *Rol.* 268.

(4) *Nor persons accused of open offences*; for the reason of bail is, that it is dubious, whether the party be guilty; but where he is notoriously guilty, he shall not be bailed. 2 *Inst.* 188, 9. *H. P. C.* 100.

(5) *As if he be outlawed*; for he is thereby attainted of the felony. 2 *Inst.* 187, 8. *H. P. C.* 101.

And by the same reason, if he be convicted by verdict, or confession. 2 *Inst.* 187. *H. P. C.* 101. 4 *Inst.* 178.

Or if the *mittimus* mentions, that the felony was confessed upon examination. 4 *Inst.* 178. *Per Haught.* 3 *Bul.* 114.

Though upon the verdict *curia advisare vult*, whether he shall have clergy, &c. 1 *Bul.* 88. *R. Dy.* 179. a.

(6) *So if he has abjured*; for such an one is attainted by his confession. 2 *Inst.* 187. *H. P. C.* 101.

(7) *An approver*; for he confesses himself guilty. 2 *Inst.* 188. *H.* 101.

(8) *Those who are taken with the manner*; for there the crime is manifest. *Ibid.*

And by the same reason, persons taken upon hue and cry. *H. P. C.* 101.

(9) *Those who have broke the king's prison*; for that is a presumption of guilt. 2 *Inst.* 188. *H. P. C.* 102.

(10) *Thieves openly known and notorious.* 2 *Inst.* 188. *H.* 102.

(11) *Appellees by approvers, unless they are of good fame, till the approver dies*, (or waives the appeal;) for the confession of his own guilt induces a presumption of guilt in the appellee. *Ibid.*

Persons in execution.

U u 2

Or

Or punished by any statute with imprisonment for their offence.

(F. 3.)
Who are
bailable
since the sta-
tute.

But the *st. W.* 1. 15. which mentions sheriffs, gaolers, &c. does not extend to judges of superior courts; and therefore *B. R.* may bail in all cases, as for treason, murder, &c. at their discretion. 2 *Inst.* 185, 6. *Hal. P. C.* 98, 99, 104. *R.* 1 *Bul.* 85. 2 *Jon.* 210. *Lat.* 12. *Sti.* 116, 418. 2 *Jon.* 222. *Pr. Reg.* 64, 65, 67. 5 *Mod.* 323.

And by the *st.* 31 *Car.* 2. 2. If any committed for high treason or felony, petition in open court the first week in term, or first day of sessions of *oyer* and *terminer*, or gaol-delivery, to be tried, and be not indicted next term or sessions, *B. R.* on the last day of term, or the justices of *oyer* and *terminer*, or gaol delivery on the last day of sessions, are required, on motion, to bail him, unless oath be made, that the king's witnesses could not be produced that term or sessions. *Vide in habeas corpus.*

But the prayer must be the first week of the term in person, or by counsel; otherwise it is not necessary to bail him. *R.* 1 *Vent.* 346.

So the prayer ought to be the first week of the term for persons indictable in *Middlesex*; and for persons indictable in a county where *B. R.* does not sit, the first day of the sessions there; for the words shall be construed *distributive*. *R. Sho.* 190.

If bail be suspended by a subsequent act; the first week, &c. after that act is determined. 1 *Sal.* 103.

Bail in high treason, when a session passes without prosecution. *Ibid.*

When he has been a long time in prison, and his life is in danger. 1 *Sal.* 103, 104.

So bail upon murder found by the coroner's inquest; for the evidence appears. 1 *Sal.* 104.

Otherwise if a bill be found by the grand inquest. *Ibid.*

There is no difference as to the bail of a peer, or a common person. *Ibid.*

Yet *B. R.* will not bail for treason, murder, manslaughter, &c. unless there be a reasonable cause. 1 *Bul.* 85. 1 *Rol.* 268. *R.* 3 *Bul.* 113. *Dan.* 678. *R.* 5 *Mod.* 455. *Ray.* 381.

And therefore after a conviction of manslaughter they will not bail before clergy. 5 *Mod.* 288. 1 *Sal.* 103. Yet there one was bailed, where there was no other question.

Or after an indictment for murder upon an affidavit of the fact. 1 *Sal.* 104. *Skin.* 683.

And now persons accused of any offence, are bailable by all persons who have power to bail, where bail is not taken away by the *st. W.* 1. or any subsequent statute.

And therefore, where a man is accused only of manslaughter, and *non liquet* that he committed the fact, he may be bailed. *H. P. C.* 99. *Dub. per Twissd.* 1 *Vent.* 93.

So

So where he is charged with giving a dangerous stroke, if the person be alive. *H. P. C.* 99.

Or with a misdemeanor only. *1 Sal.* 104.

So by the *st. W.* 1. 15. *Persons accused of command, force, or aid of a felony, shall be bailed.* *2 Inst.* 189.

Or of receiving of thieves or felons. *Ibid.*

And by equity, all accessories before or after are bailable. *H. P. C.* 100.

But if the principal be attainted, and the accessory indicted, he shall not be bailed till he pleads to the indictment. *H.* 100.

So by the *st. W.* 1. *Persons accused of larceny shall be bailed;* which is intended, if they be of good fame, and not taken with the manner. *Reg.* 268. *2 Inst.* 189. *H.* 100. *Vide F. N. B.* 249. *G.*

And by equity, those accused of burglary or robbery. *H. P. C.* 100.

So *persons accused of petit larceny only.* *2 Inst.* 189. *H.* 100.

Or imprisoned for light suspicion, if they be of good fame. *Reg.* 83. *2 Inst.* 189. *H.* 100.

And what shall be light suspicion seems to be in the discretion of the justices. *H.* 102.

So, *an appellee after the death of the approver, unless he be a known thief.* *2 Inst.* 190.

Or after the appeal waived. *2 Inst.* 188. *H.* 102.

Or in the life of the approver, if he be of good fame. *Ibid.*

So *for a trespass, for which he shall not lose life or member.* *2 Inst.* 189. *H.* 100.

And by the *st.* 23 *H.* 6. 10. A person in custody on an indictment of trespass.

And by consequence, for all crimes under felony, where bail is not taken away by any subsequent statute. *H. P. C.* 98.

As for all misdemeanors. *Mod. Ca.* 179.

[A person committed for high treason generally, four terms having passed since his commitment, without prosecuting, ground for *K. B.* to bail him. *Rex v. Wyndham.* *Str.* 2.]

[So a present indisposition arising from the confinement. *Ibid.*]

[But not a family distemper. *Ibid.*]

Nor when the illness arises from the act of the prisoner (as when *Harvey of Combe* stabbed himself after examination.) *Ibid.*

[*B. R.* Bail a convict for a libel, being very ill, before judgment. *Rex v. Bishop.* *Str.* 9.]

[*B. R.* will not bail a gaoler committed by a justice for murder, by confining a prisoner in an unwholesome room, though he had been acquitted on four indictments for the like offences. *Rex v. Aiton, M.* 3 *G.* 2. *Str.* 851.]

[*B. R.*

[*B. R.* will bail an appellee for murder, who has been acquitted on an indictment for the same crime. *Castell vid. v. Bambridge, H. 3 G. 2. Str. 854.*]

[But not an appellee for murder, who has not been indicted. *Ibid.*]

[Yet if afterwards, there appears any affected delay in the appellant, the court will bail him. *Ibid.*]

[And so if the appellee was pardoned after conviction on the indictment. *Pyle v. Grant, H. 3 G. 2. Str. 858.*]

[If on special verdict on indictment for murder, defendant obtains the king's pardon, pleads it, and it is allowed, he shall not be obliged to give bail to appear to answer an appeal, though the heir is beyond sea; for *stat. 3 H. 7.* extends not to pardons, but to acquittals by verdict. *Rex v. Chetwynd, H. 17 G. 2. Str. 1203.*]

[*Lord Baltimore* charged on oath with a rape on *Sarah Woodcock* and two women accessory before the fact, bailed. *H. 8 G. 3. 4 B. M. 2179.*]

(F. 4.)
Who may
bail.

The justices of *B. R.* may bail in all cases at their discretion. *Ante, (F. 3.)*

[*B. R.* may bail, though the coroner's inquest has found it murder, if they think the depositions do not amount to it; and they will not bail if they think the depositions amount to murder, though the coroner's inquest has found it manslaughter. *Rex v. Dalton, T. 5 G. 2. Str. 911.*]

[*B. R.* will bail a man and his wife committed for felony, if there has been an affizes since their commitment, and they have endeavoured to bring on the trial. And they will permit the defendant's affidavit to be read. *Rex v. Bell, M. 11 G. 2. Andr. 64.*]

[If one is committed for manslaughter, and it appears by the depositions before the coroner that it is no more, the court will admit him to bail. *Rex v. Magrath, M. 19 G. 2. Str. 1242.*]

In an original suit before them by indictment or appeal. *Hal. P. C. 104. 1 Bul. 85.*

Or upon a commitment returned upon an *habeas corpus*, or *certiorari*. *H. 104.*

[*B. R.* may bail one convicted and committed for a month, for keeping ale-house without licence, on *certiorari* brought, and if the conviction confirmed, will commit him for the residue of the time. *Rex v. Reader, M. 9 G. Str. 531.*]

So upon an appeal by bill removed before them by *certiorari*. *1 Sal. 61.*

[*B. R.* cannot bail defendant found guilty on an appeal of murder, without the actual consent of appellant. *Reeve v. Trindall, M. 7 G. Str. 402.*]

[*B. R.* cannot bail one committed for a contempt of the house of lords, (*Lord Shaftesbury's case*;) or of commons, (*Alexander Murray's*)

Murray's case, P. 24 G. 2.) nor for contempt of any other court in *Westminster-hall*. 1 *Wils.* 299.]

[B. R. will not bail a person charged with highway robbery if the prosecutor attends and insists he is the man, notwithstanding many affidavits to prove an *alibi*. *Rex v. Greenwood*, T. 13 G. 2. *Str.* 1138.]

[B. R. will not bail a person committed by a justice for aiding in running goods, without notice to the justice, and bringing *habeas corpus*. *Rex v. Norton*. H. 1723. *Bunb.* 143.]

[B. R. will not, on prisoner's application, permit surgeons to attend a wound *of a person stabbed by the prisoner,* to give account of it, in order to bail prisoner, the friends of party injured should do it if they oppose bailing; if they do not, the court may order it for their own satisfaction. *Rex v. Sally Salisbury*, H. 9 G. *Str.* 547.]

So the house of peers may bail a peer committed upon an indictment for murder; if the indictment be removed before them by *certiorari*. R. *Skin.* 683, 4.

So justices of gaol-delivery may bail in cases within their cognizance; as if a man be convicted before them of homicide *se defendendo*. H. 105. *Poph.* 96.

Or of homicide and has a pardon to plead. H. 105.

So justices in *eyre* may bail. *Poph.* 96.

By the *st.* 1 R. 3. 3. Every justice of peace may bail, but not before. R. *Poph.* 96. But this was repealed by the *stat.* 8 H. 7. 3.

By the *st.* 3 H. 7. 3. Two justices of peace (one *quorum*) may bail persons mainpernable by law, within their county, &c. till the next sessions or gaol-delivery, where they must deliver the bail-piece on pain of 10*l.* F. N. B. 251. F.

And therefore, two justices may bail in cases within their cognizance. H. 105.

But one cannot bail. H. 105. But now, if one justice by his warrant can apprehend, one may bail. *Mod. Ca.* 179.

And by the *st.* 1 & 2 Ph. & M. 13. They can only bail persons bailable by the *st.* W. 1. 15. *Poph.* 96.

Nor those, except in open sessions, or by two justices (one *quorum*) present at the time of the bailment.

And after examination of the prisoner and information of the fact and its circumstances; which bailment and examination they must certify at the next gaol-delivery. H. 105.

And justices of peace may bail before or after commitment to prison. H. 105. F. N. B. 250. G.

And after indictment and process against the offender. H. 106.

Sheriffs and others might bail persons imprisoned upon an indictment before them. H. 106. 2 *Inst.* 190. F. N. B. 250.

So a constable might bail. *Poph.* 96.

But by the *st.* 1 Ed. 4. 2. All indictments before the sheriff, or his officers, shall be delivered to the next sessions of the

the peace, and they cannot arrest or proceed thereon, on pain of 100*l*.

Yet by the *fl.* 23 *H.* 6. 19. The sheriff may bail, upon an indictment for a trespass.

So upon an *homine replegiando.* *H.* 103.

But if the serjeant of the house of commons takes into his custody, by order of the house, persons accused of treason, &c. he cannot bail them. *R.* 1 *Lev.* 209. *R.* *Hard.* 464.

By the *fl.* 5 *Ed.* 3. 8. The marshal of *B. R.* shall not bail persons indicted, or appealed of felony, on pain of half a year's imprisonment and ransom. *F. N. B.* 251. *I.*

Who may bail in civil actions, *Vide post*, (*F.* 10.)

(*F.* 5.) If bail be refused, when it ought not, a man may have a writ of *de odio & atia*, directed to the sheriff, *quod inquireat, &c. utrum. A. captus & detentus in prisona, &c. retatus sit odio & atia, &c.* 2 *Inst.* 55.

Remedy for
not bailing.

And if upon such inquiry, it be found, that he was accused for malice, or was not guilty, or that it was *se defendendo*, or *per infortunium*, a writ goes to the sheriff *de ponendo in ballium* until *proximam assisam.* 2 *Inst.* 42.

And he shall be bailed to 12 mainpernors. *Fleta* 1 *Ca.* 26. *Señ.* 3. 2 *Inst.* 42.

Or he may have an *homine replegiando*, which lies *nisi captus sit per preceptum regis, aut pro alio recto quare secundum consuetudinem Anglie non sit replegiabilis.* 2 *Inst.* 55. *Reg.* 77. *b.* *F. N. B.* 66. *E.*

So upon an *habeas corpus* in *B. R.* the court may bail him, though there was a sufficient cause for his commitment. 2 *Inst.* 55. *Vau.* 156.

So if a sheriff, bailiff, &c. refuse to bail upon offer of sufficient surety, when the man is bailable, he shall be amerced.

So if a justice of peace refuse to bail, he shall be fined. *Mod. Ca.* 179.

And he was fineable by the common law.

So if a sheriff, &c. refused bail where he ought not, a writ *de manucapione* founded upon the *fl.* *W.* 1. 15. went, commanding him to bail. *F. N. B.* 249. *G. H. P. C.* 103.

But now, by the *fl.* 28 *Ed.* 3. 9. All writs or commissions to the sheriff, to indict or deliver, are taken away, and consequently the writ of mainprize. *H.* 104. *F. N. B.* 250. *A.*

Remedy for not bailing in civil actions. *Vide post* (*K.* 6.)

(*F.* 6.) By the *stat.* *W.* 1. 15. If a sheriff, bailiff, &c. who has the keeping of a prison in fee, plevy any one not pleviable, he shall lose the fee, and the bailiwick for ever. *Vide* 2 *Inst.* 190.

For bailing
when they
ought not.

If an under-sheriff, &c. does it without the will of his lord, he shall have imprisonment for three years, and ransom.

If he takes money to deliver him, he shall restore double to the prisoner, and shall be amerced. *Vide* 2 *Inst.* 190.

By

By the *fl. 1 & 2 Ph. & M. 13.* If a justice of peace offend against that act, upon proof before justices of gaol-delivery, he shall be fined at their pleasure, though by the common law he was fined only *5l.* as for a negligent escape. *4 Inst. 179.*

And therefore, if he bail a man not bailable, he may be fined at discretion. *4 Inst. 179.*

As for bailing one taken upon an hue and cry, he was fined *40l. Hal. P. C. 101.*

So if he takes insufficient bail. *H. P. C. 97.*

So if he bail a person not bailable, though it does not appear by the *mittimus*, that he was not bailable. *R. Popph. 96.*

So the bailing of a person not bailable, will be a negligent escape. *1 Lev. 209.*

(F. 7.) What persons are bailable in Civil Actions.

By the *fl. W. 1. 15.* and by the writ *de homine replegiando*, it appears, that a man detained in prison by the special command of the king, that is, by process out of a court of justice, (for the king can commit to prison only by his justices,) shall not be delivered to bail by the sheriff. *2 Inst. 187. F. N. B. 66. E. 2 Sand. 60.* (F. 7.) By the common law.

Nor by justices of the forest. *2 Inst. 187.*

So no court can bail a man committed to perpetual imprisonment by judgment. *R. Mo. 666.*

And an obligation, for the enlargement of any one in execution for debt, was void by the common law. *1 Lev. 209.*

But *B. R.* may bail in all cases at their discretion. *Vide Ante (F. 3.)*

And therefore, upon error in *B. R.* of a judgment in *B.* if the defendant be in execution, though he is not bailable *de rigore juris*, yet by special grace he may be bailed. *2 Rol. 112. l. 50.*

And if the error be apparent, he shall be bailed. *R. Dy. 193. b. in Marg. D. 2 Bul. 164. Adm. 1 Rol. 386. 2 Cro. 401. Vide post (F. 10.)*

And if an error in law be assigned, he is usually bailed. *Per Co. 3 Bul. 62.*

Otherwise, if an error in fact. *3 Bul. 62.*

Or if there be error in parliament of a judgment in *B. R.* he shall not be bailed. *2 Rol. 112. l. 52. D. per Co. 2 Bul. 164.*

Or if there be error in the *exchequer* of a judgment in *B. R.* the *exchequer* cannot bail. *R. 2 Cro. 108. Cro. El. 731.*

And after the record removed into the *exchequer*, *B. R.* cannot bail. *R. 2 Cro. 108.*

So if a defendant in execution sue an attaint in *B. R.* he shall be bailed for cause, though it is not usually done. *R. Cro. El. 5. Dy. 193.*

Or if he sue an attaint in *C. B.* *R. Dy. 193. b.*

So

So if he sue an *audita querela* upon matter in writing. *Vide audita querela* (E. 4.)

(F. 8.) But now by the *§. W. 2. 13 Ed. 1. 11.* If an accomp-
By statute. ant committed to prison be aggrieved by auditors, who will not allow his reasonable expences, &c. he shall be delivered to mainpernors.

By the *§. 23 H. 6. 10.* Sheriffs and all their ministers may deliver to bail or mainprize upon sufficient surety, all persons arrested by writ, bill, or warrant in any personal action, so that they observe the day and place limited in such writ, bill or warrant.

And by the equity of this statute, they may bail upon an attachment out of *chancery*. *Semb. 2 Vent. 238. 1 Vent. 234. R. cont. 3 Leo. 208.*

* And on demurrer to a declaration on such a bail-bond, the court will not presume the plaintiff had no authority to take bail, unless some case be made in pleading to it. *2 Bl. Rep. 955. **

Or process out of the dutchy court, or the court of wards. *Semb. Cro. El. 647.*

So in an attachment of privilege, upon a prohibition, or in process, upon a penal statute. *Per C. B. Mich. 4 G. inter Field and Workhouse. (Reported Comyns's Reports 264.)*

But persons cannot be bailed by the sheriff, who are not legally in his custody, but the obligation will be by dures, and void.

But persons cannot be bailed by the sheriff, who are not legally in his custody, but the obligation will be by dures, and void.

As if the sheriff takes it upon an attachment out of the court of requests; for it has no authority to issue such process. *R. Cro. El. 647.*

So if a man be arrested in the county of *B.* and afterwards carried to another county, and there gives bail-bond to the sheriff of *B.*; for such obligation of one out of his custody is by dures. *R. Cro. El. 745. 2 Jon. 76.*

So if he gives a bail-bond, when taken upon an attachment for a contempt. *R. in C. B. inter Field and Workhouse, Mich. 4 Geo. (Reported Comyns's Reports 264.)* for such obligation shall be taken at the peril of the sheriff. *R. Sal. 608.*

By the *§. 13 R. 2. 17.* He in reversion, &c. on being received, &c. shall find bail to answer the issues of the land for the time he delays the demandant.

In an action in *C. B.* against a peer, he shall find bail. *R. 2 Leo. 173.*

* This cannot be law. *Vid. 1 Inst. 131. 2 Inst. 50. **

(F. 9.) But by the *§. 23 H. 6. 10.* Those are excepted, who
Who not. are in custody upon condemnation or execution. And therefore, shall not be bailed, though they bring writs of error. *1 Vent. 2.*

Or upon a *capias utlagatam*, or *excommunicatum*, who shall not be bailed by the *§. W. 1. 15.*

Or

Or for surety of the peace.

Or by special commandment of the justices.

Or vagrants.

And therefore if a man be committed by the court, he shall not be bailed. 1 *Rol.* 134.

Or by the chief justice. *Ibid.*

So if he be committed by the king's counsel. *Semb.* 1 *Rol.* 134, 219.

So persons in custody of the serjeant of the house of commons, cannot be bailed by him. *R.* 1 *Lev.* 209.

Nor persons in custody of the serjeant of the marches. 1 *Lev.* 209.

So *B. R.* will not bail where there is no remedy for bringing the person back again into custody, if there should be judgment against him.

As in error of a conviction for deer-stealing, a defendant in execution shall not be bailed in *B. R.* for if the judgment be affirmed, there is no remedy to have the defendant in custody. *R.* 1 *Sid.* 286. 2 *Keb.* 43.

So in error upon an indictment, by a person in execution for a fine to the king, he shall not be bailed. 1 *Sid.* 320.

So in an *homine replegiando*, after an *elongatus* returned, the defendant being taken upon a *capias in withernam*, shall not be bailed, unless he confesses the taking, and the custody of the person. *D. Ray.* 475.

Yet a man in execution, &c. may be bailed in many cases in *B. R.* though not by the sheriff, &c. As if he brings error, attain, *audita querela*, &c. *Vide ante* (F. 7.) *Post* (F. 10.)

So if a man be taken upon an *excommunicato capiendo* by the *st.* 5 *El.* 23. he shall be bailed by *B. R.* though not by the sheriff, &c. *R.* 1 *Bul.* 122.

And if he offers caution to the bishop *ad parendum mandatis ecclesie*, a writ shall go to the bishop to take the caution, and deliver him; and if he does it not, a writ goes to the sheriff to deliver him. 2 *Inst.* 189.

So upon an *excommunicato capiendo*, a man may be bailed, while the return is under the consideration of the court. *R.* 1 *Sal.* 105.

Yet this is in the discretion of the court, and may be refused. 1 *Sal.* 106.

So in error upon an indictment, it may be refused. *Ibid.*

The court of *B. R.* bail in all cases at their discretion. *Ante* (F. 10.) (F. 3, 4) Who may

And therefore in error before them of a judgment in *C. B.* if bail the error be apparent, the plaintiff in error, though he was in execution, may be bailed. *Vide ante*, (F. 7.)

So in error of a judgment in *Ireland.* *Pal.* 286.

In error to reverse an outlawry. *Dy.* 195. b.

In error to reverse an outlawry, in an appeal. 1 *Sid.* 316.

But

But after the record removed out of *B. R.* the court cannot bail. *R. 2 Cro. 108.*

So *C. B.* may bail in actions depending before them.

As in an attain in *C. B.* by a defendant in execution, the court may bail. *Dy. 193. b.*

And bail is usually taken *de bene esse* before a judge at his chambers. *Pr. Reg. 73.*

And if the plaintiff does not except against it within twenty days following, it shall be filed and allowed as good. *Pr. Reg. 68. Ray. 96.*

And it shall be taken as good bail before filing, till disallowed by the court. *Pr. Reg. 70.*

And if the defendant does not file it, the plaintiff may. *Pr. Reg. 73.*

The proper filazer, or his clerk, attends the court, or a judge, when the defendant puts in his bail; otherwise there shall be no bail. *Per Rule in C. B. Tr. 1 W. & M. Vide Rules and Orders of C. B. 104.*

But upon a writ of error out of *B. R.* the *exchequer* cannot bail; for they have no authority but to affirm, or reverse the judgment. *R. Cro. El. 731. R. 2 Cro. 108.*

So after a writ of error upon a judgment by the barons brought in the *exchequer chamber*; bail to the error shall be taken by the chancellor and treasurer, and not by the barons. *Sav. 31.*

By the *st. 4 & 5 W. & M. 4.* Justices of assize may take bail in any cause depending at *Westminster*, which shall be transmitted to one of the justices or barons of the court, where the cause is depending.

The sheriff may bail upon an *homine replegiando*. *Hal. P. C. 103.*

And by the *st. 23 H. 6. 10.* He shall let out of prison on sufficient sureties persons arrested, &c. *viz.* the sheriff and all other officers and ministers aforesaid. And before are named *sheriff, under-sheriff, sheriff's clerk, steward, or bailiff of franchise, servant, or bailiff, or coroner.*

So the sheriff must bail a person arrested by process out of the sheriff's court in *London*. *Cro. El. 77.*

[The sheriff cannot bail on an attachment, but a judge may. *Anon. M. 8 G. Rex v. Bentley, M. 13 G. Str. 479. * Cont. Ld. Raym. 723. **

So the mayor, &c. of a corporation, any one arrested by process out of their court. *R. Cro. El. 76.*

If a man be arrested upon process out of an inferior court, the serjeant may take bail for his appearance. *2 Cro. 94.*

But a mayor, &c. who is judge of the court, shall alone take bail to the action; for bail being matter of record, must be taken by the judge of the court. *R. Cro. El. 76. R. 2 Cro. 94. D. Cro. Car. 196.*

Though it be said, that the bail before the serjeant was *secundum consuetudinem ville*, it is not good. *2 Cro. 94.*

Or

Or the party may have a writ to the sheriff out of *chancery*, to bail him. *F. N. B.* 251. *B.*

So the serjeant of the house of commons cannot bail. *Semb. Hard.* 464. *Vide ante* (F. 4.)

Nor the sheriff, upon an illegal process; as upon an attachment out of the court of requests. *R. Cro. El.* 646. *Vide ante* (F. 8.)

By the *st.* 4 & 5 *W. & M.* 4. The justices of the respective courts of *Westminster*, or any two of them (whereof the chief justice to be one) may commission under the seal of the respective court whom they think fit, other than common attornies or solicitors, to take bail in any suit in the same court; which bail-piece shall be transmitted to one of the justices or barons of the same court, who on *affidavit* by one present at the taking, and fees, shall receive it as bail *de bene esse* before the justices or barons of the same court.

And such bail may be justified on *affidavits* taken before the same commissioners.

And the commissioners may examine the cognizors of such bail on oath of the value of their estates.

By rules upon this act, the *affidavit* of the bail being taken, may be before the justice to whom the bail is transmitted, or before a commissioner authorized by the statute to take *affidavits* in the same court. 5 *W. & M.* *Vide Rules and Orders of B. R. and C. B.* 82, 109.

And the bail-piece shall be transmitted to a justice of the same court, in *B. R.* within 8 days, and in *C. B.* within 10 days after the taking, if it be taken within 40 miles of *London* or *Westminster*; if it be above 40 miles in *B. R.* within 15 days and in *C. B.* within 20 days, or if the judge be in his circuit, presently after his return. *Vide Rules and Orders of B. R. and C. B.* 82, 109.

And the commissioner must have a book, in which he shall enter the names of the defendant and his bail, and of the plaintiff, the time, and by whom transmitted; and in *B. R.* the name also of the defendant's attorney. *Vide Rules and Orders of B. R. and C. B.* 83, 110.

To which book the plaintiff or his attorney may resort, to inquire of the sufficiency of the bail. *Ibid.*

But in *C. B.* a copy of the writ, whereon bail is required, must be written on parchment, and upon that the recognizance of bail ingrossed. *Vide Rules and Orders of C. B.* 108.

And the plaintiff may except to the bail within twenty days after its being transmitted, and notice to him, or his attorney, of the taking. *Vide Rules and Orders of B. R. and C. B.* 83, 110.

And upon exception, the defendant must put in better bail, or the bail given must justify themselves in court by *affidavit* in court, or taken before a judge, or before the commissioner who took the bail. *Vide Rules and Orders of B. R. and C. B.* 83, 110.

(G) The

(G) The Manner of taking Bail.

(G. 1.) In Criminal Cases.

IN the case of felony, the bail shall be bound by recognizance, each in a sum certain, and the principal in double, that the principal appear at the next sessions, or gaol-delivery, &c. et *ultra quilibet eorum corpus pro corpore.* 4 *Inst.* 178.

[But the defendant and his bail cannot be called upon their recognizance without notice except on the day on which he is bound to appear. *Rex v. Adams*, P. 9 G. 2. Br. R. H. 237.]

If a prisoner be brought up upon a *capias* and *cepi corpus* returned, the bail shall be, that he appear *de die in diem* & *de termino in terminum quousque placitum terminetur* & *quilibet corpus pro corpore.* 4 *Inst.* 179. 1 *Bul.* 45.

But if the prisoner be bailed before the return of the writ, the bail shall be only bound in a sum certain, and not *corpus pro corpore.* R. 1 *Bul.* 45.

[If defendant indicted for perjury is acquitted, the bail shall be discharged from their recognizance, on motion, though the acquittal is not entered on record; for the acquittal appears on the *poslea.* *Rex v. Spenser*, H. 25 G. 2. 1 *Will.* 315.]

Bail for striking in *Westminster-Hall sedente curia* shall be body for body. 1 *Lev.* 106.

What bail will be sufficient. *Vide post*, (K. 1, &c.)

Bail in an appeal. *Vide Appeal*, (F.—G, 4, 6, 9.)

(G. 2.) In Civil Actions.

[If defendant, before arrested, puts in bail before a judge, and gives notice to plaintiff, who does not except in 20 days, the bail shall stand, and defendant, if arrested, have a *superseas.* *Barnes* 81—*Vide next case.*]

[Bail cannot be put in before arrest, without consent; and plaintiff may arrest defendant after bail before a judge, and notice. *Barnes* 83.]

If personal actions the sheriff, &c. on an arrest shall take bail by obligation in a reasonable sum, for the appearance of the defendant at the return of the process.

[If defendant is sued by wrong addition, he must give bond according to the writ, put in bail above by his proper addition, and may plead the misnomer in abatement. *Barnes* 94.]

[Debt on bail-bond must shew that the bond was to the sheriff by his name of office; but if the declaration says it was to be paid to *the said sheriff*, &c. it is sufficient. *Symes v. Oakes*, *Shepherd v. Oakes*, H. 4 G. 2. Str. 893.]

* In debt on bail-bond, proceedings shall not be stayed, unless bail pay his principal's whole debt, and costs, as well as his own costs, and those of the other bail. 2 *Bl. Rep.* 816. *

Who

Who shall be sufficient sureties. *Vide post*, (K. 2.)

How an appearance shall be enforced. *Vide in Pleader*, (B. 3.)

And a bond to appear at the return of the writ, ought strictly to pursue the writ; otherwise, it is void, if there be a material variance. *R. 1 Vent. 233, 4. 2 Jon. 46, 138. Vide Pleader*, (2 W. 25.)

At the return of the process, the defendant shall give bail to the action.

If common bail is sufficient, he only files it; for it is no bail 'till filing. *Pr. Reg. 73.*

If special bail be required, the plaintiff may enter a *ne recipiat* with the philizer, with whom the bail shall be filed. *C. Att. 45.*

If special bail be given in *B. R.* the bail are bound by the recognizance, (but not in a sum certain,) that if judgment be given, and the defendant do not pay the condemnation, nor render himself to prison, *tunc debitum recuperatum fit* against the bail, &c. *2 Cro. 450.*

But in *C.* the bail is bound in a sum certain to the value of the debt, or damages in the writ. *2 Cro. 645. Cro. Car. 481.*

Yet the defendant himself need not be bound with his bail. *R. 1 Sal. 3.*

In an account before auditors, the defendant shall be bailed, and the bail bound, that the defendant appear *de die in diem* before the auditors, and afterwards in court, and if he be found in arrear, that he pay, or render himself. *Lut. 49, 60. Cro. El. 82. Vide in Accompt*, (E. 8.)

If an action be removed by *habeas corpus C. B.* the bail shall be bound, that the defendant appear upon eight days notice and plead, and if he be condemned, that he satisfy, or render himself, &c. *2 Cro. 97. Vide post*, (H.—I.)

How bail shall be given in an *audita querela*. *Vide audita querela*, (E. 4.)

By the *fl. 3 Jac. 8.* in error of a judgment in debt on a single bond, or bond for payment of money, or in debt for rent, or any contract, no execution shall be stayed, unless the defendant be bound with two sufficient sureties in a recognizance of double the sum recovered, to prosecute the error with effect; and if judgment be affirmed, to pay the debt, damages, and costs of the former judgment, and also the damages, and costs to be awarded for delay of execution.

And by the *fl. 13 Car. 2. 2. and 16 & 17 Car. 2. 8.* in error in other actions. *Vide for this in Pleader*, (3 B. 12.)

[In error on a judgment on a bond for money, being the same sum mentioned in certain indentures, plaintiff in error shall give bail. * For the material part of the condition was the payment of the money, and the words added only shew they were not distinct debts. * *Disbordes v. Horsey*, *H. 7 G. 2. Str. 959.*]

[Recognizance in error on judgment, after verdict in ejectment, is in the value of two years profits, and double costs. *Barnes 103.*]

[If error on a judgment on a bond, that if plaintiff furnished a man with beer, defendant would pay not exceeding 100*l.* there need not be bail, for this is not a certain demand, but a *quantum meruit*. *Thrale v. Vaughan*, T. 16 G. 2. *Str.* 1190. *Wils.* 19.]

[In error, the recognizance either of the plaintiff alone, or of sureties, is sufficient. *Barnes* 75, 78.]

But if the plaintiff in error was in execution, the bail shall not be bound, that he render himself again in execution. *R. Dy.* 193. *in marg.* *R.* 3 *Leo.* 113.

Bail cannot be for part of a debt, but it shall be for the whole. *1 Bul.* 107.

And if it be for the execution only, it shall be amended, and made bail for the judgment, as well as the execution. *R.* *1 Bul.* 107. *2 Cro.* 272.

[After final judgment, bail cannot be put in. *Barnes* 92.]

If bail for one defendant be in *Michaelmas* term, for another in *Hilary*, it shall be amended, and made of the same term; for the plaintiff cannot proceed upon a joint action against two defendants, upon bail filed in several terms. *Lat.* 183.

Vide ante, (F. 10.)

(H) When Bail shall be filed.

BY the *st.* 5 & 6 *W. & M.* 21. common bail shall be filed within eight days after the return of the process, upon pain of 5*l.* for which judgment and execution shall be immediately awarded.

[The rule for payment of 5*l.* for not filing common bail, shall be absolute on the first motion. *White v. Holland*, H. 13 G. *Str.* 737.]

And the defendant does not appear, 'till he files common, or special bail. *Vide in Pleader*, (B. 1.)

And 'till he appears in *B. R.* or a *committitur* be entered upon the roll, the plaintiff cannot declare against him. *Vide ibidem*.

Nor in *C. B.* 'till he files bail, or be brought into court by *habeas corpus*. *Vide ibidem*.

And by the course in *C. B.* where the action is removed by *habeas corpus*, bail shall be given before the action be depending in court. *2 Cro.* 97, 98.

And if common bail be not filed, the attorney shall be punished. *1 Rol.* 372.

And upon motion it may be entered, though the attorney be dead. *1 Rol.* 372.

If common bail be not filed in eight days, upon producing the writ and return, and a certificate, that it was not filed, there shall be judgment for 5*l.* without more, *nisi*, &c. 5 *Mod.* 392.

Yet if bail be filed in *B. R.* the last day of the term in which the bail is filed, it is good. *R. Hob.* 70. *1 Rol.* 333. *A.* *2 Cro.* 384.

And

And if no bail be filed it is not error. *R. Hob. 264. 5. R. cont. Cro. El. 894. R. acc. 2 Cro. 568. R. cont. Mo. 694. Semb. cont. Cro. El. 223.*

If bail be filed in one term, and another added the next term, it shall be bail only of the last term. *1 Sal. 100.*

Bail in an action upon an arrest shall be entered, and filed in the office of the philizer, by whom the process was made. *Compt. Att. 45.*

Bail upon an *habeas corpus*, or writ of privilege, shall be entered in the prothonotary's office, from which the *habeas corpus*, or writ of privilege, issued. *Compt. Att. 45.*

Vide ante, (F. 10.)

(1) Bail in an Habeas Corpus.

BA I L upon an *habeas corpus* shall be before declaration. *R. 2 Cro. 97.*

If there be an *habeas corpus* to an inferior court in *London*, or within five miles, to remove a cause, the defendant ought, within four days after allowance of the writ, to give notice to the plaintiff, or his attorney, or such as enters the plaint, in writing, of the names and additions of the bail, and before what judge, and when it will be offered. *Vide Rules and Orders of C. B. 16.*

If the plaintiff, or his attorney, cannot be found, the notice shall be the chief clerk in the inferior court, or his deputy; and there shall be an *affidavit* of this, before the bail be taken. *Vide Rules and Orders of C. B. 16.*

If there be no exception to the bail within 28 days after tender, upon an *affidavit* of notice, it shall be filed. *1 Sal. 98. Vide Rules and Orders of C. B. 16.* which mentions 20 days.

And if it be not filed within four days after the 28, upon a certificate thereof, a *procedendo* shall be granted. *Vide Rules and Orders of C. B. 16.*

And where the *habeas corpus* is returnable *immediate*, there shall be a *procedendo*, if bail be not given within eight days. *Vide Rules and Orders of C. B. 16.*

An *habeas corpus* to the courts of *London*, or other inferior court within five miles may be returnable *immediate*. *Comp. Att. 46. Vide Rules and Orders of C. B. 15.*

So in all removals by *habeas corpus*, bail shall be given, if there was bail in the inferior court. *Mod. Ca. 242. 1 Sal. 98.*

So an executor, who has found bail in an inferior court, shall find bail but not to pay the condemnation, but for appearance only, if the plaintiff declares within two terms. *1 Sal. 98.*

But the bail in an inferior court will be good in a superior; for the party might have excepted to it there; except in *London*. *1 Sal. 97.*

So an executor may be excused without bail, though the removal be by *habeas corpus*. *Semb. 1 Sal. 98, 101.*

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X x

Or,

Or, if the cause of action in the inferior court be vexations. *Semb. per Holt.* 1 *Sal.* 101. But this is cause for diminution of the sum in which the bail are bound, not for excusing bail. 1 *Sal.* 102.

So, if bail is not given in eight days after the *habeas corpus* allowed, a *procedendo* shall be awarded by the barons at any time before bail.

[If defendant puts in bail, and plaintiff does not declare in two terms, the cause is out of court, but there is no limited time for plaintiff to give rule to put in bail. *Barnes* 90.]

Bail in an Audita Querela.

Vide Audita Querela, (E. 4.)

(K) What Bail shall be sufficient.

(K. 1.) In Criminal Cases.

IN criminal cases, the bail shall be in a sum certain, or *corpus pro corpore*. *Hal. P. C.* 97.

* But this latter method is now rarely used. *H. H. P. C.* vol. 2. 125. *

[If bail is taken *corpus pro corpore*, and the principal run away, the bail are not hanged, but amerced. *Rex v. Dalton*, T. 5 G. 2. *Str.* 911.]

By the *st. W.* 1. 15. that shall be sufficient bail, for which the sheriff will answer.

And therefore, there ought to be two at least. *H. P. C.* 97. But usually there are four. *Pr. Reg.* 68.

[In an appeal for murder by writ on the civil side, two bail only are required; if on the crown side by *certiorari*, there must be four. *Vid. Castell v. Bambridge*, H. 3 G. 2. *Str.* 854.]

And in felony they shall be subsidy men. *H. P. C.* 97.

And the sum shall be 40*l.* at least. *H. P. C.* 97.

* The number of the bail, and their sufficiency, and the sum of the recognizances, is much in the discretion of him who is to take the bail, and therefore he may examine them on oath. *H. H. P. C.* 2 vol. 125. *

* On articles of the peace, the court may require bail for such a length of time, as they think necessary for the preservation of the peace, and are not confined to a twelvemonth. 1 *Term Rep.* 696. *

* And where they had at first required for 14 years, they afterwards reduced it to two years, on its appearing that the information was depending against the defendant, which must necessarily be determined within that time. *Id.* *

But a justice of peace may take money, as a pledge for the surety of the peace. *Cro. Car.* 446.

(K. 2.) In Civil Actions.

By the *ft. 23 H. 6. 10.* the sheriff, &c. shall let to bail, upon reasonable sureties of sufficient persons, having sufficient in the same county.

And therefore, the sheriff shall take sufficient sureties for his indemnity. *Cro. El. 624.*

Yet if he takes only one surety, it is good. *Per Poph. Cro. El. 624. R. Cro. El. 672, 808, 852, 862. Cro. Car. 446.*

And if the bail swear that they are sufficient, and afterwards confess that they were not so in court, they shall be put in the pillory. *Cro. Car. 146.*

So, if the sheriff takes bail, who has nothing within the county; it is at his peril, and the bail stands. *R. Cro. El. 808, 852, 862.*

So bail, given to the sheriff will be sufficient bail to the action. *1 Sal. 97.*

The court may accept money deposited, in lieu of bail. *Pr. Reg. 66.*

But an infant shall not be accepted for bail. *Pr. Reg. 68.*

Nor a person, who claims privilege; as, a tipstaff in *chancery*. *1 Sid. 68.*

* Nor an attorney. *Doug. 466.* Nor clerk to defendant's attorney. *Cowp. 828.* Nor sheriff's officer, nor bailiff, nor any other person concerned in the execution of process, nor persons outlawed after judgment. *R. M. 14 G. 2.*

* Yet if a person who by the rules of the court is not permitted to become bail, shall be put into the bail piece, the plaintiff cannot take an assignment of the bail bond, and proceed upon it, as if no bail had been put in. *Doug. 469.*

* And if notice of justification has been given by a new attorney, not allowed by the court, the bail will not be permitted to justify. *Doug. 217 2 Bl. Rep. 1323.*

* So, bail on a *testatum copias*, from *Middlesex*, put in where the writ is served, and not in *Middlesex*, is as no bail, and plaintiff may proceed as if defendant had not appeared. *2 Bl. Rep. 1061.*

The sum in bail, taken upon the *ft. 23 H. 6. 10.* shall be proportioned to the cause of action. *1 Mod. 16.* (K. 3.)

By the *ft. 13 Car. 2. 2.* the bail for appearance shall not be bound in a penalty above 40*l.* if the cause of action be not particularly expressed. When common bail.

Before that, it might be to any sum the sheriff pleased. *R. 2 Cro. 286.*

And upon appearance, common bail shall be taken, unless the debt be above 10*l.* *Pr. Reg. 72.*

Or, in debt of a greater value, if the defendant be not taken, but surrenders himself upon the exigent. *Sal. 496.*

X x 2

Or,

Or, appears upon a summons, attachment, or distress. *1 Mod. 236.*

Or, upon a *superfedeas quia improvide.*

So, by the *st. 12 G. 29.* in any process, where the cause of action amounts not to 10*l.* and in inferior courts, where it amounts not to 4*cs.*

Or, if it amounts to more, if there be no *affidavit* of the cause of action.

So there shall be common bail, in debt upon a penal statute. *R. Tel. 53.*

Or, in an information upon a penal statute generally. *Pr. Holt.*

So, in debt, the defendant shall be discharged upon common bail, upon *affidavit*, that 10*l.* is not due, if the plaintiff cannot deny it, or the plaintiff is in prison upon an escape warrant, &c. *Mod. Ca. 63. * Vid. 1 Wilf. 335. which seems cont. **

So, in error by an executor, of a judgment against his testator, he shall not find special bail within the *st. 3 Jac. 8.*

Or of a judgment against himself. *R. 2 Cro. 350. Cra. Car. 59. Lit. 3. 1 Sid. 183. Vide in Costs, (B.)*

So, in an action against an executor, or administrator. *Pr. Reg. 66. 3 Bul. 317. Tel. 53. Lit. 81. 2 Brownl. 293.*

Or, against an heir. *2 Jon. 82. 2 Lev. 204.*

Though it be upon an *habeas corpus* for removing the cause out of an inferior court. *R. 1 Sid. 418. Cont. Lit. 81. 1 Lev. 245. But R. acc. 1 Lev. 268. 2 Lev. 204. R. 2 Jon. 82.*

Or, against bail in another action.

Or, against a privileged person; as, an attorney, &c. *1 Mod. 10. 2 Mod. 181. 2 Brownl. 134. Sal. 544.*

Otherwise, if an attorney be sued by original. *2 Brownl. 134.* So, where the damages are uncertain; as, in trespass generally. *Hansd's. Introd. 2.*

Action upon the case for slander; and, generally, in other actions upon the case. *1 Sid. 183.*

Ejectment. *Hansd's. Int. 2.*

Action for battery. *1 Mod. 2.*

Or, in account, till judgment *quod computet.* *R. 1 Lev. 300. except in special cases. Noy 28.*

Or, in an action upon a bond given upon a *replevin.* *1 Sal. 99.*

In a *replevin* or *homine replegiando*, where the defendant appears before the *capias in withernam.* *Sal. 582.*

If he appears *gratis*, though an *elongata* be returned. *Sal. 583.*

And there shall not be special bail by reason of an *ac etiam*, where it is not requirable upon the merits of the cause. *1 Sid. 183.*

So there shall be common bail, where the plaintiff was formerly nonsuited for default of a declaration. *Pr. Holt. * Lord Raym. 679. **

Or, if the plaintiff does not declare within three terms after appearance. *Pr. Reg. 65, 71. 1 Mod. 25.*

* And

* And the bail-bond cannot be assigned, when the original suit is out of court for want of declaring in time. *2 Bl. Rep. 876.**

Common bail may be filed at any time before the roll be marked for special bail. *Pr. Reg. 67.*

[A trooper three days listed, receiving pay, but only learning to ride, discharged on common bail. *Bayley v. Jenners. Str. 2.*]

[A gunner in the artillery, though he has extraordinary pay, is within the description of a common soldier, and to be discharged on common bail. *Johnson v. Louth. Str. 7.*]

[An armourer in a man of war is a common sailor. *Barnes 114.*

[A person is in the king's service whilst his name continues on the books, though he has been absent beyond his leave of absence. *Barnes 95.*]

[An out-pensioner of *Chelsea Hospital* is not a soldier. *Barnes 432.*]

[If the original debt does not require special bail, the court on motion will discharge special bail, and common bail shall be accepted in debt on the judgment, though above 10*l.* and the court will stop proceedings pending writ of error. *Gammage v. Watkin, F. 7 G. 2. Str. 975. Palmer v. Nudham, P. 3 G. 3. 3 B. M. 1389.*]

[If defendant is surrendered after judgment, and on lying two terms without being charged in execution, supercedes himself, and the action is brought on the judgment, common bail is sufficient. *Hall v. Howes, P. 9 G. 2. Str. 1039. B. R. H. 244.*]

[If plaintiff has marked his process for bail when he ought not, as in debt on judgment, where the original debt did not require it, and defendant has put in bail above; yet the court will discharge it, and order common bail to be accepted. *Robinson v. Nicholls, T. 10 G. 2. Str. 1077. Andr. 15.*]

[If plaintiff recovers in *trover*, and defendant obtains injunction, and plaintiff brings action against him for the goods, he cannot hold him to special bail, for by the former recovery the property was vested in defendant. *Adams v. Broughton, T. 10 G. 2. Str. 1078. Andr. 18.*]

[If on affidavit's being deficient, common bail is ordered to be taken, and plaintiff then makes sufficient affidavit, takes out new writ, and holds defendant to bail, and next day moves to discontinue on payment of costs, defendant shall be discharged on common bail, and plaintiff pay costs of the application. *Be-lisante v. Levy, P. 17 G. 2. Str. 1209.*]

[But if it appears that the bail who have justified are forsworn and worth nothing, and thereupon plaintiff arrests defendant in a second action before he discontinues, defendant shall not be discharged on common bail. *Olmius v. Delany, M. 18 G. 2. Str. 1216.*]

[If defendant is superseded, and then gives a note for the same debt, and plaintiff arrests him on that note, he shall be discharged on common bail. *Taylor v. Wasteneys, M. 18 G. 2. Str. 1218.*]

[If defendant is superseded for want of prosecution, he shall not be held to bail on judgment in that cause. *Barnes 116.*
* *Corup. 72.**

* But

* But he may be charged in execution, after judgment obtained in the second action. *Cowp.* 72. *

[If defendant discharged on the insolvent act, promises afterwards to pay the debt, and is arrested thereupon, he shall be discharged on common bail. *Turner v. Schomburg*, T. 18 G. 2. *Str.* 1233.]

[So a bankrupt, who after his certificate allowed, promises payment of a debt due before the bankruptcy. *Bailey v. Dillon*, H. 32 G. 2. 2 B. M. 736.]

[A judgment or decree in a court in *France* for damages, for a malicious prosecution, does not raise a debt here to hold to special bail. *De Balse v. Mackenzie*, M. 19 G. 2. *Str.* 1243.]

[An affidavit made by plaintiff three years before on his going abroad, is not sufficient to hold to special bail. *Collier v. Hagu*, T. 21 G. 2. *Str.* 1270.]

[If a judgment is in trespass for above 10*l.* or if the judgment is not for original debt or sum above 10*l.* defendant shall not be held to special bail in an action on such judgment. *Cressley v. Kell*, H. 19 G. 1. 1 *Wils.* 120.]

* Nor on a promise to pay the debt and costs amounting to more than that sum. *Cowp.* 128. *

[A serjeant in the guards cannot be arrested for a debt under 10*l.* by process of the palace court. *Goodall's Case*, P. 21 G. 2. 1 *Wils.* 216.]

[If plaintiff in original action has special bail, and waives it (as, by declaring in another county) he shall not have bail in an action on the judgment, and if it is taken, the recognizance shall be discharged. *Crutchfield v. Seyward*, P. 32 G. 2. 2 *Wils.* 93. *Barnes* 116.]

[In action for malicious prosecution, where plaintiff was acquitted on flaw in indictment; *Barnes* 76, otherwise for false imprisonment.]

[One discharged on an insolvent act, for debt due before the day. *Barnes* 61.]

[Affidavit that *A.* and *B.* are indebted, is not sufficient to hold them to bail. *Barnes* 70.]

[In debt on bond, if plaintiff does not produce the bond on motion, common appearance is sufficient. *Barnes* 72.]

[For penalty given by act of parliament. *Barnes* 80.]

[On bottomry-bond, ship lost; affidavits that it *might* have been saved, *more* affidavits that it was *unavoidably* lost; common appearance. *Barnes* 87.]

[Duplicate of discharge under insolvent act, intitles defendant to common appearance. *Barnes* 100, 102, 105.]

[So a bankrupt's certificate. *Barnes* 101.]

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[If bail bring error, on award of execution against them on recognizance in error, bail is not required. *Barnes* 194.]

[Defendant arrested at the suit of husband and wife, action discontinued, defendant charged in custody for the same sum and cause

cause of action, at the suit of husband only; *superfedeas*, and common appearance. *Barnes* 113.]

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[If there is not an *ac etiam* in the *præcipe* left with *filazer*, (though there is in the *capias*;) common appearance. *Barnes* 117.]

[Defendant superfedded, and then action discontinued, he cannot be again arrested for the same debt, with a small addition not requiring bail. *Barnes* 393.]

[If plaintiff removes his action by *certiorari*, defendant shall be discharged on common bail. *Barnes* 399.]

[If drawer of promissory note is sued by drawee, and also by indorsee, common appearance in each. *Barnes* 403.]

[Plaintiff shall lose his special bail where he declares differently from his writ; as, if the writ is in his own right, and he declares as executor. *Hally v. Tipping*, *P. 10 G. 3. 3 Wilf.* 61.]

But where the debt, or damages in an action of debt, *detinue*, (K. 4.) trespass for taking of goods, action upon the case, (except for slander,) amount to 20*l.* special bail shall be required. When special bail.

So, in debt to 10*l.* or more. *Pr. Reg.* 72.

So, in debt upon bond.

Though it be dated twenty years before. *1 Sid.* 63.

Though there was a composition with other creditors, which binds the plaintiff if well made; for perhaps it was not regularly made. *1 Sal.* 99. * *Lord Raym.* 383.*

Though the obligation was by duress, or upon an usurious contract; for that shall be tried. *1 Sal.* 100.

Or, for money won at play. *Ibid.*

So, if a defendant be outlawed, special bail shall be required before error allowed for reversing it, by the *ſt. 31 El.* 3. *R. Lit.* 301.

But by the *ſt. 4 & 5 W. & M.* 18. special bail before reversal of the outlawry shall be required only where the court directs.

And if a special bail was required before the outlawry, it shall now be so afterwards; otherwise, not. *Sal.* 496.

So, if an executor or administrator has been guilty of a *devastavit*. *3 Bul.* 317. *1 Sid.* 63. *1 Lev.* 39, 245. *1 Sal.* 98. *1 Vent.* 355.

So if there be a general judgment against an executor or administrator, and he brings error: he shall find special bail within *3 Jac.* 8. *R.* *1 Sid.* 368. *1 Lev.* 245.

So, where a cause is removed by *habeas corpus*, or *certiorari*, special bail shall be given. *1 Lev.* 268.

Though the cause of action be of less value than requires bail in the superior court. *Ibid.*

* So, special bail was required in trover, removed out of an inferior court, though the merits appeared against the plaintiff. *Lord Raym.* 767.*

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* And the court will examine whether an action be *bailable*, though removed from an inferior court by *ha. cor.* but will discharge

charge defendant on common bail, unless the case be manifestly vexatious. *2 Bl. Rep.* 886. *

So, where the plaintiff has privilege; as, an attorney, &c. *Pr. Reg.* 68. But now an attorney that sues for fees shall not have special bail, if the cause of action does not otherwise require it. *Pr. R.* 74. By the *st.* 13 *Car.* 2. 2. Upon an arrest by attachment of privilege, bail may be required above 40*l.*

So where the damages are uncertain, the justices at their discretion may grant special bail: as, in battery, if it appears to be outrageous. *Pr. Reg.* 72. *1 Sid.* 276, 307.

* And no counter affidavit shall be allowed to lessen the bail directed by a judge for an assault. *1 Black. Rep.* 192. *

In a conspiracy, or, false imprisonment.

In slandering of a title; or, *scandalum magnatum.* *Ray.* 74. *2 Mod.* 215. *R.* 3 *Mod.* 41.

In other action upon the case. *Semb.* *1 Sid.* 276. *1 Lev.* 39.

In covenant, the bail shall be proportioned to the breach assigned. *1 Sid.* 63.

So, in debt upon bond for performance of covenants. *1 Sid.* 63. *1 Sal.* 100.

* But in debt on bond conditioned for indemnification, &c. the defendant ought not to be held to bail for the penalty, but only for the amount of the damages incurred. *Doug.* 449, 450. *

So, a prisoner discharged by the stat. of insolvent debtors, shall find special bail, if he be afterwards arrested for a sum above 100*l.* *R. Mod. Ca.* 301.

So, after a *capias in withernam*, if the defendant plead *non cepit*, he may be admitted to special bail. *Sal.* 581, 2.

So, if the principal does not appear at the return of the process, the bail-bond for appearance shall not be discharged, till special bail be given to the action. *1 Sid.* 386.

So in debt upon a recognizance of bail, special bail shall be given. *Per 2 J.* 2 *Mod. Ca.* 237.

By the *st.* 12 *G.* 29. in an action above 10*l.* the plaintiff shall make *affidavit* of the cause of action, and the sum sworn to shall be indorsed on the process, and the sheriff shall take bail for no more.

If the plaintiff requires special bail, he ought to give notice of it to the defendant's attorney. *Pr. Reg.* 70.

And notice by his attorney is sufficient, though the roll be not marked. *Pr. Reg.* 71.

And if no notice be given, nor the roll marked before common bail filed, special bail strictly cannot be required. *Pr. Reg.* 73.

And the marking the roll, was only to shew the value of the action, which did not appear in the *latitat*; but now, since the *st.* 13 *Car.* 2. 2. it is not necessary; for it is now expressed in the *ac etiam.* *Pr. Reg.* 74.

And now, if it appears by the *ac etiam* that special bail is required, the defendant, or his attorney, shall give notice to the plaintiff, or his attorney, of the names, abode and vocation of his bail. *Mod. Ca.* 24.

After

After notice, the plaintiff has 20 days to make exception to the bail. *Mod. Ca. 24. 1 Sal. 98.*

If he does not except to, or does accept the bail, the attorney who put it in, shall file it in 20 days after acceptance, on pain of 40s. By rule *Trin. 13 Car. 2. B. R. Vide Rules and Orders of B. R. 26.*

If he takes exception, the defendant must justify them in court, or change them within a convenient time upon notice; for the court requires an *affidavit* of notice, but there is no set time for it. *Mod. Ca. 24.*

*But bail who surrender their principal need not justify. *2 Bl. Rep. 758.**

Or, by consent, the defendant may justify them at a judge's chamber. *Mod. Ca. 24.*

So in vacation, for necessity; but then he ought afterwards, to justify them in court the next term. *Mod. Ca. 24. *2 Bl. Rep. 1064.**

So in error, the defendant ought to except, and give notice thereof in 20 days; and the exception shall be entered with the clerk of the errors. *Mod. Ca. 230.*

And he shall also serve a rule before execution. *Mod. Ca. 230.*

[Although plaintiff has been *non pros'd* in a former action for want of a declaration, yet defendant shall find special bail to a second action. *Turton v. Hayes, T. 7 G. Str. 439.*]

[In debt on a judgment, though defendant might have pleaded bankruptcy to the first action. *Combs v. Blackall, M. 8 G. Str. 477.*]

*So in debt on judgment by defendant in the original action for costs of a nonsuit. *2 Bl. Rep. 1274.**

*So where a cause in which defendant has been held to bail, is referred to arbitration, and the arbitrator awards to plaintiff a sum exceeding 1*l.* defendant may be held to bail again in an action on the award. *2 Term Rep. 756.**

[On a contract to re-transfer stock borrowed. *Adams v. Verells, H. 8 G. Str. 497.*]

[In an action on a judgment special bail may be required; but if plaintiff bring second action on the second judgment, it shall not. *Chambers v. Robinson, M. 1 G. 2. Str. 782.* And the court will grant *superfedeas* on the two first actions. *Ibid.*]

*No bail is requisite on error of a judgment in an action of debt upon a judgment. *1 Black. Rep. 506.**

*In debt on judgment, the defendant may be held to bail, if no bail given in the original action, notwithstanding error brought on the original action and bail thereon. *2 Bl. Rep. 768.**

But bail surreptitiously put in are as no bail, and cannot surrender. *Id. 1179.**

*So an attorney may be special bail in order to surrender, though he cannot justify. *Id. 1180.**

A debt of 2*l.* must be sworn to, to hold to special bail in *Wales*, or counties palatine, on process from *Westminster Hall*,
notwith-

notwithstanding 12 G. c. 29. *Smith v. Dudley*, M. 12 G. 2. Str. 1102. *Barnes* 89.]

[Leaving notice of the names, &c. of the special bail under the party's door, is in no case sufficient. *Rice v. Kelly*, P. 7 G. 2. B. R. H. 28.]

[If notice is not given, but after bail put in plaintiff inquires after the persons, and declares himself satisfied with them, it is the same as if he had notice before. *Ibid.*]

[If one sues on *stat. 9 Ann. c. 14.* for money won of him at play, it shall be considered not as a penalty, but as a debt, and he is intitled to special bail. *Turner v. Warren*, M. 11 G. 2. Andr. 70. Str. 1079.]

The affidavit to hold to bail in B. R. must be positive, and not by way of inference; in C. B. they admit of a cross affidavit from defendant, and a supplemental one from plaintiff to supply the defects of the first. 1 Term Rep. 716.

[If the affidavit is, that defendant borrowed 200*l.* of plaintiff on bottomry, which money is now due and owing to plaintiff by virtue of said bond, as thereby may appear, it is not sufficient; for the money may be paid, and not appear. Nor shall plaintiff be permitted to make supplemental affidavit, but defendant shall be discharged on common bail. *Heathcote v. Goslin*, T. 14 G. 2. Str. 1157.]

[Affidavit by a merchant in London, that defendant owes plaintiff so much, as appears by plaintiff's affidavit made in Amsterdam, which deponent believes to be true, is not sufficient to hold to special bail. *Rios v. Belifante*, P. 17 G. 2. Str. 1209. *Vanmorrell v. Julian*, M. 22 G. 2. 1 Wils. 231.]

[Affidavit by a third person, that defendant is indebted to plaintiff, as appears by account, or by bill and indorsement or bond, under defendant's hand, not sufficient. *Anon.* H. 19 G. 2. Wils. 121. *Rollin v. Mills*, T. 24 G. 2. 1 Wils. 279. *Kelly v. Devereux*, M. 26 G. 2. 1 Wils. 339. *Pomp v. Ludvigson*, 2 B. M. 655. *Jennings v. Martin*, M. 4 G. 3. 3 B. M. 1447.]

Nor by an executor, that defendant is indebted as appears by testator's books. Str. 1219. Yet a supplemental affidavit that he believes the debt to be due will be admitted in C. B. to hold to bail. 2 Bl. Rep. 850. 1 Term Rep. 84.

Nor by plaintiff's book-keeper that defendant is indebted to plaintiff as he verily believes. Str. 1226.

*But an affidavit in trover, that defendants have possessed themselves of divers goods, belonging to the plaintiff, and have refused to deliver them up; and that they or some of them have converted them, &c. is sufficient to hold them to special bail. *Corwp.* 529.*

[But affidavit that defendant is indebted to plaintiff, in 10*l.* "as he computes it," is sufficient. *Moulthby v. Richardson*, T. 33 & 34 G. 2. 2 B. M. 1032.]

*Affidavit on the lottery act 27 G. 3. c. 1. should specify the nature of the offence, and aver that the defendant has incurred the

the forfeiture; but the offence needs not to be described circumstantially; nor is plaintiff obliged to swear that defendant is indebted to him to the amount of the penalty. 1 *Term Rep.* 705.*

[Special bail shall be required before the reversal of an outlawry in a personal action, if a proper affidavit is made, though there was none before the outlawry. *Serecold v. Hampson*, H. 16 G. 2. Str. 1178. *Wilf.* 3.]

[On proper affidavit the writ may be marked for bail in *trover*, without order of a judge; for it is more an action of property, than a *tort*. *Catlin v. Catlin*, T. 16 G. 2. Str. 1192. *Wilf.* 23.]

[In error on judgment in debt on bond, each bail must justify in the sum recovered only, if it is double the sum really due. *Moor v. Lynch*, P. 21 G. 2. 1 *Wilf.* 213.]

If the plaintiff's affidavit is positive to the debt, no other affidavit can be received to contradict it. Thus if plaintiff in *trover* against custom house officers for goods seized, swears they are indebted, they must give special bail, though the goods are in the king's warehouse, and there is a suit in the *exchequer* for condemnation. *Emerson v. Hawkins*, M. 26 G. 2. 1 *Wilf.* 335. **Doug.* 450.*]

[Bail-bond taken in more than double the sum sworn to, is not void by *stat.* 12 G. 1. c. 29. *Norden v. Horsley*, P. 30 G. 2. 2 *Wilf.* 69. *Barnes* 159.]

[Affidavit that defendant *is* justly indebted, (by slip of the pen for *is*), is no affidavit at all, and shall not be made good by supplemental affidavit, (as it might if the first was an affidavit but omitted a necessary circumstance,) and defendant shall be discharged on common bail. *Reeks v. Groneman*, H. 4 G. 3. 2 *Wilf.* 224.]

[If defendant gives special bail, and plaintiff declares in case, when it should have been in covenant, *by mistake*, (the writing being a deed, having been executed in *Ireland*, where no stamps are necessary,) and discontinues on payment of costs, and brings second writ for the same cause of action, defendant shall give special bail. *Bates v. Barry*, T. 8 G. 3. 2 *Wilf.* 381.]

[There must be special bail, on action for forfeiture of 200*l.* for having unsealed wrought silk, contrary to 26 G. 2. c. 21. And affidavit that plaintiff has cause of action against defendant for 200*l.* forfeited by him for so much silk, &c. is sufficient. The act requires no affidavit. *Rex v. Rebord*, M. 5 G. 3. 3 *B. M.* 1569.]

[On an order of a judge, defendant may be held to special bail, on an action for criminal conversation; and the court will not enter into the merits, before trial, in order to discharge bail. *Barnes* 61.]

[Special bail for damages sworn to for destroying hop-poles; without judge's order. *Barnes* 65.]

[For not dancing according to articles. *Barnes* 67.]

[If there is a joint affidavit against two defendants, they cannot be held to bail on it severally, on separate actions. *Barnes* 70.]

[If a sentence in a court in a foreign country, for *A.* to pay *B.* &c. is reversed by a superior jurisdiction there, *A.* cannot be held to bail here on that sentence. *Barnes* 73.]

[Special bail may be required on a second action on a bond, when plaintiff had been nonsuited in a former action. *Ibid.*]

The affidavit of an infamous person, who had been transported for picking pockets, and condemned for returning, not sufficient to hold to bail. *Barnes* 79.]

Yet the affidavit of one convicted of perjury was held sufficient. *Barnes* 116.]

[In debt, assumpsit, trover, covenant by *ac etiam*, bail is of course; trespass, detinue, special action on the case, or of covenant, at discretion; for words none, unless slander of title. *Barnes* 80.]

[In covenant, bail only where damages can be reduced to a certainty: and on bond to indemnify, plaintiff must swear how, and how much, he is damaged. *Barnes*, 108, 109.]

[Affidavit of plaintiff's attorney, that money appears due on bond, and defendant acknowledges it, sufficient. *Barnes* 82.]

[If defendant is superseded by surprise, he may be again held to bail for the same debt. *Barnes* 62.]

[There must be bail on an action on a judgment brought after error brought, and bail therein. *Barnes* 71.]

[If defendant arrested on *latitat* removes himself to the *Fleet*, and plaintiff declares against him there, there need be no new affidavit. *Barnes* 75.]

[Defendant shall give notice of justifying bail two days before day of justification, exclusive of *Sunday*. *Barnes* 82, 303.]

*Notice on *Saturday* to justify on *Monday* is not good, it must be for *Tuesday*.*

[Bail on action for mesne profits, after recovery in ejectment. *Barnes* 85.]

[On agreement in writing, to deliver goods, or forfeit 100*l.* *Barnes* 86.]

[There must be positive affidavit of debt due to a bankrupt's estate, unless bankrupt refuses to make it. *Barnes* 91.]

[Affidavit by assignees of bankrupt, as appears by bankrupt's last examination, and, as we believe, is sufficient. *Barclay v. Hunt*, M. 7 G. 3. 4 B. M. 1992.]

[Or as appears by bankrupt's books, and, I believe, for swearing to belief, is sufficient for executor, administrator or assignee of bankrupt. *Tonna v. Edwards*, H. 9 G. 3. 4 B. M. 2283.]

[But if any words render affidavit *unpositive*; as, defendant is indebted for so much received, for which he has not accounted, common bail. *Champion v. Gilbert*, T. 7 G. 3. 4 B. M. 2126.]

[Affidavit of debt, as appears by account, is made good by defendant's acknowledging the account. *Barnes* 100.]

[On debt on judgment in inferior court, there must be bail, though there was bail below. *Barnes* 94.]

[Bail

[Bail cannot justify at judge's chambers, but by consent; therefore if exception is in vacation, they have four days in term to justify. *Barnes* 110, 111, 115.]

[Bail residing in the country, may justify by affidavit (if plaintiff does not oppose.) *Barnes* 102.]

[On rule to bring in body in six days, justification before judge is sufficient, if plaintiff does not except. *Ibid.*]

[If cause of action accrues after bankruptcy, and the money is to become due on a contingency, (as if *A.* undertakes to indemnify *B.* and *B.* is not damnified till after commission against *A.*) defendant must give bail. *Barnes* 113.]

Affidavits of different plaintiffs against the same defendant, cannot be made on the same stamp. *Barnes* 115.]

[The sheriff is not to bring the body into court on the common rule, if he has a bail-bond; bail above must be perfected; if defendant is in custody, plaintiff must declare against him in custody of sheriff, if he would remove him it must be by *habeas corpus ad resp.* *Barnes* 400.]

[In debt on judgment for 10*l.* (including costs) though original debt under 10*l.* *C. B.* requires special bail, *B. R.* only common. *Belither v. Gibbs*, *T. 7 G. 3. 4 B. M.* 2117.]

[If after bail justified, plaintiff not disclosing this by side-bar rule, discontinues and brings new action, the court will discharge the side-bar rule. *Belchier v. Gansell*, *M. 10 G. 3. 4 B. M.* 2502.]

[Landed property in *Jamaica* does not qualify to justify, because not subject to the process. *Boddy v. Leyland*, *H. 10 G. 3. 4 B. M.* 2526.]

[*A.* gives bond conditioned that *B.* pays rent of land in *Ireland*, affidavit of arrears due, is sufficient. *Long v. Lynch*, *H. 11 G. 3. 3 Wilk.* 154.]

(K. 5.) Remedy for insufficient Bail.

By the *st. 23 H. 6. 10.* If the sheriff returns a *cepi corpus*, or *reddidit se*, he shall have his prisoner at the return day, as before the act.

And if he has not, the sheriff shall be amerced by the court, upon a rule given to bring in the body. *Compl. Att.* 311. *1 Sal.* 99.

*And he is liable to an action, as well as to amerciaments. *Per Holt. Ld. Raym.* 425.*

[All rules on sheriff of *London* or *Middlesex* to return writs, or bring in the body, shall be to do it in four days after service. *Barnes* 294.]

[The sheriffs of *London* and *Middlesex* shall be obliged to return their writs, and bring in the body in four days (instead of six as formerly.) General rule, *T. 6 G. 3. 3 B. M.* 1921.]

The first amerciamment shall be 40*s.* And if he has not the body then, the plaintiff shall have an *habeas corpus*. *Comp. Att.* 311.

If

If he does not return the *habeas corpus*, he shall be amerced. *Ibid.*

If he returns, *languidus in prisona*, the plaintiff shall have a *duces tecum licet languidus*. *Ibid.*

If he still makes default, the amerciaments shall be increased, and repeated *toties quoties*, and he shall be estreated into the crown office, and so into the exchequer. *Ibid.*

If there be an exception to the bail, and they be not justified, there shall be an amerciament against the sheriff, notwithstanding the bail.

Though the bail to the sheriff be offered to the court. *Per Holt Mod. Ca. 122.*

[If the sheriff takes one surety in a bail-bond, it is enough. *Cook v. Brockhurst, T. 5 G. 2. Fort. 369. Sed. 2. V. infra, Barnes 60.*] (a)

[If there is only one person bail, and he surrenders defendant, the render is insufficient to excuse the sheriff. *Barnes 60.*]

[Proceedings against the sheriff shall not be discharged, though the bail was sufficient at the time of taking it. *Barnes 80.*]

[If bail is justified after plaintiff applies for attachment against sheriff, he shall pay costs. *Barnes 80.*]

[If bail is not perfected till after plaintiff is intitled to attachment against sheriff, he shall pay costs of application against him. *Barnes 98.*]

*But though the rule to bring in the body be expired, yet if defendant justify bail, before plaintiff moved for an attachment against the sheriff, it is in time to prevent the attachment, and if an attachment be afterwards obtained it will be set aside with costs. *Thorold v. Fisher, Bl. Rep. C. B. East. 1788, 9.**

But the most usual way is, that the sheriff assigns the bail-bond to the plaintiff.

And by the *st. 4 & 5 Ann. 16.* At the request and costs of the plaintiff he shall assign it to him, by indorsing it under his hand and seal in the presence of two witnesses, which may be without stamp, so as it be stamped before sued; and when forfeited the plaintiff may sue it in his own name, but the court may by rule give relief to the plaintiff or defendant, or to the bail as is reasonable; which rule shall be in the nature of a defeazance to the bail-bond.

[After verdict on bail-bond, defendant may have leave to file bail in the original action, on circumstances. *Barnes 74.*]

*Bail-bond cannot be put in suit till after 4 days from the appearance day of the return of the writ. *2 Bl. Rep. 1009.**

[If the fourth day is Sunday, the bail-bond cannot be assigned till after Monday. *Bullock v. Lincoln, M. 5 G. 2. Str. 914. Id. 782.**]

(a) Note; There is no repugnancy between this case and the next: it is at the peril of the sheriff that he takes one bail, and it is sufficient if the party appears by putting in bail to the action, but as this must be done before surrender, there must of necessity be two to ground the surrender upon.

[Bail.

[Bail-bond well assigned, four days after writ returnable, though Sunday intervening be one. *Anon. E. 4 G. Str. 86. Vide post contra.*]

[If there are not two witnesses to the assignment, it is void. *Neat v. Mills, M. 9 G. 2. Fort. 371.*]

[But in action on bail-bond assigned to plaintiff, it is not necessary to aver that the assignment was attested by two credible witnesses, nor to set forth their names, nor to make *proferet* of the assignment. *Leafe v. Box, H. 19 G. 2. 1 Wils. 121.*]

[Action on the bail-bond must be in the same court as the original action, though the bail is an attorney of another court. *Morris v. Rees, M. 13 G. 3. 3 Wils. 348.* *unless on special circumstances, and if brought in another court, proceedings shall be set aside. *3 Bur. 1923. Barnes 92.*]*

[The defendant shall not traverse the arrest of the principal; for it would avoid all bail-bonds civilly taken, without exposing the party by an arrest. *Watkins v. Parry, T. 7 G. R. on demurrer, Str. 444. Semb. also on Sci. Fa. Watkins v. Marjib, T. 7 G. Fort. 264. Haley v. Fitzgerald, M. 12 G. Str. 643.*]

[If the declaration alleges that the bail-bond was assigned by the sheriff according to the statute, it is sufficient, though it does not say by indorsement under hand and seal, in presence, &c. *Mislin v. Morgan, M. 3 G. 2. Ld. Raym. 1564.*]

*If bail-bond is said to be assigned to the use of plaintiff, it is well. *Fort. 369.**

*Where plaintiff might have had judgment against the original defendant, bail below are liable for the whole debt and costs, and not barely for the sum sworn to. *Coup. 71.**

A bail-bond is not void though the debt is not sworn to, or the writ marked, or the bond taken in too large a sum, though sheriff and perhaps plaintiff are punishable; it is therefore not necessary to set forth these things in declaration on the bail-bond. *Whiskard v. Wilder, P. 30 G. 2. 1 B. M. 330.*]

[If it is averred that the money was not paid to plaintiff, it is enough without saying it was not paid to the sheriff, for he has assigned it. *Kendal v. Bromwich, P. 8 G. 2. affirmed in exchequer chamber. Fort 371.*]

[In an action on bail-bond, if the declaration sets forth, that the *capias* issued out of term time, the bond, the arrest, and the writ are void. *R. on general demurrer. Efstwicke v. Cooke, P. 2 G. 2. Ld. Raym. 1557.*]

[If on exception to bail, defendant adds bail, but does not justify, plaintiff without excepting to them, may proceed on bail-bond. *Barnes 74.*]

[If the bail to the sheriff become bail above, plaintiff's having taken assignment of bond does not waive exception, if they do not justify he may proceed on the bond. *Barnes 90.*]

*Formerly, if after regular bail put in, the plaintiff excepted to them, it was a waiver of the proceedings on the bail-bond. This practice having been objected to, as a serious hardship on the plaintiff, by forcing him if he *did except* to the bail above, to
wave

wave the benefit of the bail-bond, and if he did not to be put off with *bad* bail, in case the proceedings on the bail-bond were set aside, the court made a rule, that, in future, wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail in order to stay proceedings on the bail-bond) should be that he will put in and *perfect* bail on such a day, analogous to the case where the sheriff is ruled, who before he can discharge himself, must give notice that he will put in and *perfect* bail: and in that case the plaintiff may oppose the bail in court without its being a waiver of the bail-bond. *Corwp. 769.**

[Plaintiff must give notice *in writing* of exceptions to bail, or he cannot proceed on bail-bond. *Barnes 88.*]

[If in debt on bail-bond, defendant pleads that it is void, and there is a demurrer, and a side-bar rule for sheriff to return the writ; this rule cannot be set aside till it is determined whether the bond is good or not; if it is good, the assignment amounts to a return. *Lord Brooke v. Stone, T. 21 & 22 G. 1. 1 Wilf. 223.*]

[After a *cepi corpus* returned on an attachment for want of appearance, and bail-bond assigned, plaintiff waving proceedings on bail-bond, may have a messenger to bring in the body of the defendant. *Cuthbert v. ADean, in Sc. M. 1721. Bumb. 82.*]

[A plaintiff proceeding on bail-bond for want of justification, may deliver declaration in an original action, as *de bene esse*, but if he demands a plea it is waiver of exception to bail, and proceedings on bond shall be stopt. *Barnes 92.*]

And after the assignment accepted, the plaintiff shall not proceed with the amerciamment against the sheriff. *Per Holt, Mod. Ca. 122.*

But an action upon the case does not lie against the sheriff for taking insufficient bail; for by the statute he was compellable to take sureties. *R. 1 Rol. 92. l. 50. 93. l. 25. 807. l. 50. R. Cro. El. 624. 460. Mo. 428. R. 2 Sand. 60. R. 1 Sid. 23, 439. R. 1 Mod. 244. 2 Mod. 83. R. 1 Lev. 86.*

Though the defendant does not appear at the day. *Per Holt, Mod. Ca. 122.*

Though the party will not accept them. *1 Sal. 99.*

Yet if the defendant demurs to the declaration in such action, it will be against him; for it is a private act, and the defendant ought to plead the statute, and that he took sufficient sureties pursuant to it. *R. Cro. El. 460. Mo. 428. Semb. Cro. El. 624. R. 2 Sand. 155. R. 1 Sid. 23, 439. R. 1 Vent. 55, 85.*

*This has lately, on good grounds, been held as a public act, and that there is no occasion to plead it. *2 Term Rep. 569.**

And in such plea the sufficiency of the surety is not traversable. *R. 1 Mod. 228.*

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And an averment in these words, (*ijfdem A. & B. habentibus sufficientia*) is sufficient as well as *quod habuerunt*. R. 2. Sand. 60.

So an action for an escape does not lie against the sheriff, if he takes insufficient bail, whereby the defendant goes at large. R. 2. Mod. 180. 1. Mod. 228.

So an action does not lie against the sheriff by the bail, for taking him as bail, when he had no freehold. R. Mo. 636.

And though the *st. 23 H. 6.* says, that bonds in other form to the sheriff, by colour of his office, shall be void, yet a bond by sureties, who are not sufficient, is not void by this statute; for it only avoids bonds taken in other form than the statute prescribes, not different in matter. *Semb. cont. Cro. El. 672. R. acc. Cro. El. 808, 852, 862. Mo. 636.*

* And the undertaking of the defendant's attorney, in order to procure his discharge, to put in bail or pay the debt, is not within this statute, because the undertaking is given to the plaintiff in the action, and not to the sheriff. 1. Term Rep. 418. *

Yet a bond to appear in a plea, or at a place, different from the return of the writ, is void. R. 1. Vent 233, 4. Vide Pleader, (2 W. 25.)

* If it appear in a declaration by the assignee of the sheriff on such bond, that the bond is void by the provisions of the statute, the court on motion will arrest the judgment, after verdict against the defendant on a plea of *non est factum*. 2. Term Rep. 569. Vid. Ld. Raym. 353. *

So if the judges in an inferior court take insufficient bail, an action upon the case does not lie against them; for they do it as judges, and not as gaoler, though they also have the custody of the gaol. R. Hutt. 120.

But if the bail in the inferior court, upon an *habeas corpus* to remove the cause, procure others whom they know to be insufficient, to be bail in the superior court, an action upon the case lies against them. R. Cro. El. 714. Vide in Action upon the Case for Deceit (A. 4.)

(K. 6.) Remedy for refusing Bail.

But if a man refuse bail, when he ought to take it, an action upon the case lies against him. R. Cro. Car. 196. R. 2. Mod. 31. Vide ante, R. 1. Leo. 189. (F. 5.)

So an action upon the *st. 23 H. 6. 10.* for *4cl.* by any one *qui tam*, &c. Cro. El. 76.

Or an action upon the same statute for treble damages, by the party grieved.

But a refusal of bail does not subject him to a false imprisonment. R. Cro. Car. 196. R. 2. Mod. 31.

And there shall not be an action upon the case against the bailiff who refuses, but against the sheriff. 2. Mod. 32.

(L) At what Time Bail shall be allowed.

Vide ante
(H)

BA I L may be given generally, upon an appearance by the defendant.

But where the defendant comes in custody, generally, he shall not be admitted to bail, till the return of the writ.

As if he be taken upon a *capias in withernam* in an *examine replegiando*, he shall not be bailed till the writ be returnable, and a declaration demanded, and *non cepit* pleaded. *R. Sal. 583.*

So in an appeal, the defendant ought not to be bailed till the return of the writ. *Sal. 582.*

(M) How far the Bail shall be liable.

IF common or special bail be given in *B. R.* by the course of the court, it shall be common bail to any other action against the same defendant in the same term. *4 Inst. 179. 2. Cro. 449. 1 Mod. 16. 2 Sho. 183, 335. (a).*

So if bail be filed the last day of the term in *B. R.* and the bill be any day of the same term, the bail shall be liable upon it. *1 Rol. 333. l. 20.*

So the bail shall be liable, though the plaintiff does not declare within two terms, where he was stayed by injunction, if he declares after the injunction dissolved. *R. 3 Mod. 274.*

So bail in *B. R.* being general, and not for a sum certain, shall be liable for the whole condemnation, though the bail to the sheriff was for a less sum. *Per Pemb. Ch. Jus. and Secondary. Skin. 70.*

[If the declaration and verdict is for more than the bail is bound for, he shall be liable *pro tanto*. *R. per cur. on consideration. Martin v. Moor, B. 5. G. 2. Str. 922.*]

In assault to damage of 50*l.* bail jointly and severally for 140*l.* verdict for 300*l.* each bail shall pay 140*l.* *Barnes 76.*

(a) Note; this is stated in terms rather too vague and general; in the *4 Inst.* it is only said, that any stranger may, in the same term, sue by bill in any personal action, him that is by bail in the king's bench: the utmost that can be inferred from this, is, that every subsequent plaintiff may have a common appearance entered without the necessity of suing out process. The case in *1 Mod. 16.* is but a *dictum* by *Keil*. That the course of the court is, that if a man be brought in on a *latitat* for 20*l.* bail is taken for no more, and yet he stands bail to all actions at the same party's suit; otherwise if a stranger bring an action against the defendant. And this is acknowledged by *Holt, Ch. J. 6 Mod. 268.* to have been formerly the rule, and is there reprobated by him. But after the *st. 13 Car. 2. c. 2.* which enacted, that no bail should be required for more than 40*l.* unless the cause of action were expressed in the body of the writ, in imitation of that statute it is said in *6 Mod. 266.* a rule was made *22 Car. 2.* and found in the secondary's book of that time, that in case of bail, if the recovery was less than was mentioned in the *ac etiam*, the bail should not be charged at all in that action: subsequent to that rule, there are cases which were decided strictly according to the letter of it, and others which rendered the bail liable only *pro tanto*; this question however had a solemn discussion in *Martin v. Moor. Str. 922.* and was decided on principle that the bail should be liable *pro tanto*, and not totally discharged. *Doug. 30.*

[If defendant surrenders to a wrong prison, whereby plaintiff loses a trial, the bail-bond is not discharged. *Barnes* 64.]

If judgment in the original action be for the defendant, and afterwards reversed in error, the bail in the original action will be liable, as well as if the first judgment was for the plaintiff. *R. 2 Cro.* 95. *Dub.* 2 *Jon.* 96.

And the bail is not discharged by removal of the record by writ of error. *R. Mo.* 850.

[If a trial be lost, the bail-bond shall stand as a security, even though bail above has been put in and perfected; but if defendant will confess judgment, proceedings on the bail-bond shall be staid, even though defendant become bankrupt. *Tatlock v. Swan*, *P. 10 G. 2.* *B. R. H.* 364. *Merryman v. Carpenter*. *M. 20 G. 2.* *Str.* 1262.]

If there be bail in an inferior court, and afterwards the cause is removed by a *habeas corpus*, and bail filed in *B. R.* and then remanded by *procedendo* the same term; the bail in the inferior court will be liable, as if it never was removed. *D. cont.* generally. *1 Sid.* 313. *R. cont.* 2 *Cro.* 203. *Yel.* 120. *Bro. Mainprize* 6. But it was *R. acc.* 2 *Cro.* 363. and said there, that *Bro.* shall be intended, where the *procedendo* was not the same term. *R. Mo.* 836. 2 *Bul.* 286. *Acc.* 1 *Rol.* 64.

[If plaintiff in the city court, declares in debt, on a *concessit solvere*, and the suit being removed and bail above, he declares *de novo*, in case on promises, the bail are still liable. *Gunn v. Mackhenry*, *T. 24 G. 2.* 1 *Wilf.* 277.]

[If recognizance of bail on *certiorari* to remove indictment, is actually forfeited by defendant's neglecting to go on to trial, it shall not be discharged, though defendant has since gone on to trial, and been acquitted; and though costs against him for the first neglect have been taxed, and he be in custody on attachment for non-payment. *Rex v. Lyon*, *H. 4 G. 3.* 3 *B. M.* 1461.]

(N) To what they shall not be liable.

BUT if a cause be removed by *habeas corpus*, and afterwards remanded by *procedendo* in another term, the bail below will be discharged. *R. 2 Cro.* 363. 2 *Bul.* 286.

Or if it be remanded after the bail below discharged. *Yel.* 120.

So bail in an original action shall not be charged with costs in writ of error, if the judgment be affirmed. *R. 1 Rol.* 335. *l. 10.* *R. 2 Cro.* 636. *R. Cro. El.* 587, 8.

Nor the bail upon error in *B. R.* of a judgment in *C. B.* for the costs in error in parliament upon a judgment affirmed in *B. R.* 1 *Sal.* 97. for the party shall give new bail upon error in parliament. 2 *Mod. Ca.* 79.

So if bail be given in a suit by *A.* against *B.* they shall not be charged, if *A.* declares against *B.* and another jointly. *R. Jon.* 188.

So if three men bring an action, and the defendant puts in bail, at the suit of four, they cannot declare. *D. 1 Mod. 5.*

So if the party for whom bail is entered, be misnamed, the bail shall not be charged. *Semb. Cro. El. 223, (458, 9.) Mo. 407.*

Or the declaration and judgment be for a larger sum than was contained in the *ac etiam*. *Mod. Ca. 266. 1 Sal. 102. *Vide the notes supra.**

So if there be bail in an action in *comitatu Eborum*, upon which the plaintiff declares in *comitatu civitatis Eborum*; though the judgment be right, and the action for the same sum, and against the same person for whom bail was given, the bail shall not be liable, *R. 3 Lew. 235.*

So in an action against *A.* and *B.* if bail be given by *A.* in *Michaelmas* term, and by *B.* in another term, they are not chargeable. *Semb. Lat. 183.*

Misprision in the bail-piece, or *reddidit se*, shall not be amended to be conformable to the writ. *Mod. Ca. 309.*

But the declaration may be amended, to make it agreeable to the bail. *Mo. 407.*

[If bail is excepted to, and thereon two others are put in and justify, the first ceases to be bail, and is not liable. *Barnes 104.*]

[Defendant is arrested in *K.* plaintiff declares in *L.* he loses his bail. *Barnes 116.*]

(O) What will be a Breach of the Recognizance.

IF after a bail-bond for appearance, the principal surrenders himself to custody before the day for appearance, but afterwards does not appear, the bail shall not be excused. *Semb. 3 Mod. 88.*

If there be bail in *C. B.* and afterwards removed to *B. R.* and debt there upon the recognizance, it is sufficient to say that the principal did not surrender himself to the Fleet, without saying, nor to the marshal of *B. R.* *2 Cro. 98.*

If the plaintiff in error does not take out a *scire facias ad quod diendum errores*, the bail forfeit their recognizance; for they are bound, that the plaintiff do prosecute the error with effect. *R. 1 Rol. 337. l. 5.*

Or if he takes out a *scire facias*, but does not deliver it to the sheriff. *R. 1 Rol. 337. l. 7.*

Or does not assign errors. *R. 1 Sid. 294.*

If a man, bailed upon an indictment, surrender himself to the Fleet in discharge of bail in an action, and is afterwards removed by *habeas corpus* to *B. R.* and there escapes; the bail shall not be excused, unless he was surrendered in discharge of his bail upon the indictment. *1 Sal. 105.*

[If one be taken up for a libel, and enter into recognizance to appear the first day of term, *ad respond.* and not to depart, and

the attorney-general then exhibits an information, and then enters a *nolle prosequi* on it, and on the last day of term files another information for the same libel and another, and on this last information defendant is convicted, if he does not appear his recognizance is forfeited. *Rex v. Ridpath. Fort. 358.*

[Recognizance is forfeited on the return of *ca. sa. Barnes 106.*]

(P) What not.

BUT if the party appears at a subsequent day in the same term, the bail-bond is not forfeited. *R. 1 Brownl. 74.*

Thought he issue be upon *comperuit ad diem*. *1 Brownl. 74.*

So if the condition be for an appearance at *Westminster*, and the term being adjourned to *St. Alban's* before the day, he appears there. *R. Mo. 430.*

So if he puts in common bail, he shall plead *comperuit ad diem*. *1 Sal. 8.*

(Q) How the Bail shall be relieved.

(Q. 1.) By Act of the Court.

IF bail be given, where the party has the privilege of an insolvent debtor by the statute, the bail shall be thereby discharged upon motion. *Mod. Ca. 22.*

* So where defendant becomes a peer pending the action. *Doug. 45. **

So where the bail have continued for many years, upon a cause removed by *habeas corpus*, without prosecution, they may be discharged. *Pr. Reg. 65.*

So if the plaintiff does not declare within two terms after bail filed, the bail may be discharged. *Semb. Pr. Reg. 65, 71. 1 Mod. 25. 3 Mod. 274.*

Otherwise if the plaintiff was stayed by injunction in *chancery*. *R. 3 Mod. 274.*

So if the bail be oppressed by irregular proceeding, the court upon motion will relieve them: As if the proceeding be before the effoin day of the term next after the term when the process was returnable; for the defendant had all that term to give bail, and if he gives it before, the plaintiff may take an assignment, but he shall not proceed before. *Mod. Ca. 226.*

[If the writ be returnable at a day out of term, the bail-bond taken on it is void, and that without plea. *Mills v. Bond, M. 7. G. Str. 399.*]

[If the bail-bond is assigned after the death of the original defendant, the court will stop proceedings against the bail; but if it appears that plaintiff knew not of the death of the principal, they shall pay costs. *Kingston v. Holloway, P. 12 G. 2. Andr. 374.*]

[Proceed-

[Proceedings on bail-bond may be staid on costs, (and if plaintiff has been delayed of trial, but not otherwise) receiving short notice, and bond to stand for security: if the writ is returnable the first or second return, and defendant is to plead without imparlance, plaintiff must declare *de bene esse*, or he delays himself, *Barnes* 81, 84, 91.]

[If bail-piece is lost (on affidavit) a new one may be filed, that bail may surrender principal. *Barnes* 108.]

[Plaintiff excepts the day after term, defendant justifies the first day of next term, proceedings on bail-bond shall be stayed. *Barnes* 110.]

[Proceedings against bail set aside, if judgment signed two months after plaintiff's death, on recent application they shall not be put to *audita querela*. *Barnes* 277.]

[Judgment in case, debt on that judgment, defendant held to bail, second judgment *ca. sa.* returned against principal before return of writ against bail, the court will stay proceedings on the recognizance, pending error on the first judgment. *Barnes* 86.]

[A bail excepted to, but whose name is not struck out of the bail-piece, may (on costs) have an *exoneretur* entered *nunc pro tunc*, even after two *scire fa's* and *nichils* returned. *Humphrey v. Leite*, T. 7 G. 3. 4 B. M. 2107.]

[Bail in error who refuses to justify, but does not apply to have his name struck out of the bail-piece, may have it struck out at any time, even after the bail who have justified are become insolvent. *Jones v. Tub*, M. 26 G. 2. 1 Wils. 337.]

[If the principal surrenders the same day, but after the *scire facias* is returned, the court on motion will stay proceedings against the bail. *Galton v. Wigley*, H. 9 G. 2. B. R. H. 208.]

[If the second *scire facias* is returnable the first day, the court will not a week after stay proceedings on the common terms; but will stay execution till after affirmance in the principal cause. *Cole v. Buckland*, T. 4 G. 2. Str. 872.]

[But after judgment on *scire facias* against bail, the court will not stay execution, if there is no bail in error, unless the bail undertake to pay the costs in error also, on affirmance. *Risdon v. Francis*, M. 4 G. 2. Str. 877.]

[On reversing outlawry on special original, defendant gives bail to appear to new original, to be filed in two terms; plaintiff proceeds to judgment, defendant brings error, no original filed in the two terms, yet court will not discharge recognizance, bail may plead. *Barnes* 86.]

So by the *st. 4 & 5 Ann.* 16. If an action be brought on a bond or other security by the bail after an assignment to the plaintiff, the court by rule may give relief to the defendant, or the plaintiff in the original action, or to the bail; which rule shall be in nature of a defeazance to such bail-bond, or other security.

So after proceeding against the bail, if the defendant will accept a declaration in the original action, and plead to issue, and

all this before trial lost, upon payment of costs, the prosecution against the bail shall be stayed.

But in such case the defendant shall plead in chief, and not in abatement. *Sal. 519.*

If a judgment be given by the defendant, to indemnify his bail, execution shall not be taken out till the bail are damnified, though the debt is not paid. *Mod. Ca. 77.*

(Q. 2.) By Surrender of the Principal.

So if the principal surrender himself in discharge of his bail after judgment, and before a *capias* against him be returned and filed, the bail are excused in *C. B.* as well as in *B. R.* (Q. 2.) What shall be a surrender in due time.

1 *Leo. 58.*

[Bail in action by original have, till the *quarto die post*, (*sedente curia*) to surrender principal in *B. R.* as in *C. B.* and proceedings on *sci. fa.* shall be stayed without costs. *Bailley v. Smeathman.* (R. 3.) *Vide post,*

M. 7 G. 3. 4 B. M. 2134.]

And may enter an *exoneretur* upon the bail piece; for till such entry, the discharge of the bail is not compleat. 1 *Sal. 98.*

[Although the *exoneretur* is by neglect of the officer not actually entered on the bail-piece; yet if plaintiff is apprised of the surrender, *sci. fa.* against the bail shall be set aside, though plaintiff's attorney knew not of the surrender. *Bond v. Isaac,* *M. 31 G. 2. 1 B. M. 409.]*

So if he surrenders himself after the return of the *capias* filed, before return of the *scire facias* against the bail, it is sufficient. *R. 1 Rol. 333. l. 40 to 50. 334. l. 22. 2 Bul. 260. Lat. 150. 1 Brownl. 65.*

Though a writ of error was brought, and determined before the *capias* awarded. *R. 1 Rol. 333. l. 55. Popph. 186.*

[If bail do not apply to stay proceedings pending error, till their time to surrender is out, the court will not give them time for that purpose. *Richardson v. Jelly, T. 21 G. 2. Str. 1270.]*

[If a writ of error is allowed before the time is expired for surrendering the principal, though notice of allowance is not given till after, the court will stay proceedings on *scire facias*, till after the writ of error determined. *Capron v. Archer, P. 30 G. 2. 1 B. M. 340.]*

So if the first *scire facias* be returned *nichil*, and the bail bring in the principal in the morning of the return day of the second *scire facias*, or before, it is sufficient. *R. 1 Rol. 334. l. 10. Pr. Reg. 64, 72. R. cont. Mo. 850. 3 Bul. 182. R. acc. 2 Rol. 367. Cro. El. 618. Cont. Cro. El. 738. R. acc. 2 Cro. 109. Litt. 194. Jon. 139.*

Though the surrender in the morning was only to the tipstaff, and he be not brought to a judge, nor committed to prison till *post meridiem*. *R. 1 Rol. 334. l. 30.*

[Surren-

[Surrender on the appearance-day of action on the recognizance, or on the appearance-day of return of first *sci. fa.* if first *feci* returned, or of second *sci. fa.* if two *nichils*, (sitting the court) is good. *Barnes* 82.]

And if there be an entry of the commitment upon the return-day, though it was not entered till afterwards, and it appears only by examination, that it was in the morning, yet it is sufficient; for the record being, that he was committed such a day, the court will intend it in the morning, to save the bail. *R. 1 Rol. 334. l. 35.*

And though the bail appear at the return-day by their attorney, yet the surrender may be accepted. *Semb. 2 Rol. 367, 382.*

If there be a surrender of the principal, though he has privilege, the bail shall be excused. *R. Litt. 194.*

[Bail for a peer, in a recognizance for the peace, may surrender the peer in his discharge, though he come in of himself. If the recognizance is not in court, so that it cannot be done, the bail may take the peer into custody in the interim. *Duke of Leeds' Case. Fort. 359.*]

[If action on recognizance is brought in *C. B.* against attorney of *B. R.* and plaintiff desists, and then defendant surrenders the principal; and then bill is filed, the render is good. *Hoare v. Mingay, M. 5 G. 2. Str. 915.*]

If the principal surrender himself in discharge of his bail in *B. R.* or be brought in by the bail, after a writ of error pending in the exchequer, which is a *superfedas*, and the principal cannot be committed in execution by the court, yet the bail are excused, and the marshal of *B. R.* shall detain him in prison as a pledge, till judgment be affirmed or disaffirmed. *R. 1 Rol. 335. l. 5. R. Mo. 850, 853. R. cont. Lat. 149. Agr. 3 Mod. 87. R. Jon. 138. Ray 100.*

Otherwise in *B.* after error brought, and there allowed. *1 Rol. 334. l. 40. Hob. 116.*

But in *B.* if the record be not removed before the return of the writ of error, the principal may surrender himself in discharge of the bail. *R. Hob. 116.*

So if the defendant be taken by an extent at the suit of the king, he may be brought by *habeas corpus*, and surrendered in discharge of his bail; for the suit there was prior to the extent. *R. 1 Sal. 353.*

[The king's debtor may be brought up and surrendered in a civil suit; but the court will be satisfied that it is for a just debt, brought before the information, and that the application is by the bail. *Case of Bail of Boise and Sellers. M. 12 G. Str. 641.*]

The bail in a civil action, of a man convicted for felony and pardoned on condition of transportation, may surrender him in discharge of themselves. *Bail of Vergen's Case, M. 18 G. 2. Str. 1217.*

[But if the felon is actually on board, the court will not grant *habeas corpus*. *N. B.* Was he not on board, the *habeas corpus* must

must be on the crown side. *Fowler v. Dunn*, P. 7 G. 3. 4 B. M. 2034.]

[Bail may bring up the principal (an impressed man in custody by *habeas corpus*, and surrender him in their discharge: he is first committed to the marshal, an *exoneretur entered*, and the man delivered *instante* to the military officer. (This is under a *pres. act.*) *Bond v. Isaac*, P. 30 G. 2. 1 B. M. 339.]

[A soldier not in custody may be surrendered by his bail, committed to the marshal, and *instante* set at large. *Ibid.*]

If the defendant be in custody by an escape warrant upon the *st. 1 Ann. 6.* The bail may have a writ to the sheriff, &c. to detain him in discharge of the bail, who shall return the receipt of the writ, and whether the defendant be in his custody, on pain of *sol.* and on such return a *reddidit se* shall be entered on the bail-piece, which shall be as effectual, as if the defendant had rendered in court.

So debt shall not be sued upon a recognizance in *B. R.* against bail, if they surrender the principal in eight days after full term; whereby the bail has equal advantage in debt, as in a *scire facias*. *Mod. Ca. 132. 2 Mod. Ca. 340.*

So in *C. B.*

And if there be an action in *B. R.* upon a recognizance in *C. B.* the bail shall have the same rule, as they would have in *C. B.* *Mod. Ca. 132.*

So in debt upon a recognizance of bail, the bail shall have advantage of the surrender at any time before the return of the *latitat.* 1 *Sal. 101. Carth. 515.*

If the principal surrender himself before the return of the *scire facias*, but does not give notice to the plaintiff, nor enter an *exoneretur* upon the bail-piece, and upon a *scire feci* there is judgment against the bail, they shall not be aided upon motion, without an *audita querela.* *R. 1 Sal. 101.*

[Defendant cannot render himself, unless bail is perfected in time. *Barnes 105.*] *Quare, For,*

[After judge's order for time to put in and perfect, defendant puts in, but does not justify bail, and surrenders; this is good, and proceedings on bond set aside. *Barnes 111, 117.*]

[Bail excepted to, and not justifying, cannot surrender defendant, but new bail may be put in, and before excepted to, surrender him. In *C. B. P. 10 G. 3. 3 Wilf. 59.*]

But a surrender after the first *scire facias* returned *scire feci*, and filed, is too late. 1 *Rol. 334. l. 5.* (Q. 3.) What not.

Or if the first *scire facias* be returned *nihil*, in the afternoon of the return day of the 2d *scire facias.* 1 *Rol. 334. l. 30.* Yet *Cro. El. 618.* says, that a surrender before judgment in the 2d *scire facias* is sufficient.

So a surrender after a plea to the 2d *scire facias* is too late, and cannot be made without the consent of the plaintiff. *R. Pal. 392.*

[If

[If a rule to shew cause why proceedings on *sci. fa.* should not be set aside, is discharged, surrender of the principal the same day at a judge's chambers, is too late; it should be *sitting the court*, and in strictness, on the *quarto die* of the return of second *sci. fa.* *Simmons v. Middleton*, P. 23 G. 2. 1 *Wils.* 269. *Barnes* 75.]

[Surrender at eleven at night on the last day is not sufficient, though defendant is delivered to a judge's tipstaff, and lodged in prison that night; he must be brought into court, or before a judge, to have *exoneretur* entered. *Hunt v. Cox*, M. 3 G. 3. 3 *B. M.* 1360.]

[Surrender at a judge's chambers, on *quarto die post*, on an action on recognizance, is not good, it must be in court. *Barnes* 66.]

[If the *reddidit se* is signed by the judge, and the bail refuses to pay the fees, and defendant goes at large, the surrender is ineffectual, and the entry void. *Barnes* 70.]

So after error brought, the surrender of the principal does not discharge the bail in error for their recognizance is, *to prosecute the writ of error with effect, or pay the condemnation with costs.* R. 2 *Cro.* 402. 3 *Bul.* 191. 1 *Rol.* 392. D. 3 *Mod.* 87.

Yet after execution against the bail, the principal was accepted in discharge of the bail; where it appeared, that the principal absconded before by covin between him and the plaintiff. R. 1 *Bul.* 43.

[Defendant cannot be surrendered by his bail, before return of the writ; if done, it shall be set aside; but if the return is passed before application made, defendant shall be brought into court by *habeas corpus*, and surrendered *de novo*. *Barnes* 88.]

[The true time of defendant's surrender should be marked by the filazer. *Barnes* 69.]

(Q. 4)
How the
surrender
shall be re-
corded.

If the defendant surrender himself in discharge of his bail, it ought to be entered upon record. 1 *Rol.* 337. l. 10. *Hob.* 210.

And therefore, if a surrender be pleaded, he ought to conclude, *that he is ready to aver it by the record.* Lat. 149. *Hob.* 210. *Mo.* 888.

And the entry ought to be, *quod reddidit se in exonerationem manucaptorum suorum.* *Hob.* 210.

And if the entry says, that the surrender was in court *die non juridico*, it is void. 1 *Rol.* 392. *Popb.* 186.

And upon a certificate, that the defendant is in custody, the master of the office writers, *reddidit se*, upon the bail-piece, which discharges it. *Pr. Reg.* 64.

Otherwise the bail would be charged, though the defendant be in prison. *Ibid.*

So if the bail surrender the principal after the return of the *capias*, at a judge's chamber, and he escape before he has continued two days in custody, the bail shall not be discharged. *Mod. Ca.* 238.

So

So if they do not give notice of the surrender to the plaintiff, they shall pay the charges of the plaintiff thenceforwards, before their discharge. *Mod. Ca.* 238.

But the surrender will be good, though no notice be given. *Ibid.*

And though he escape, or be rescued, after being two days in the custody of the marshal. *Mod. Ca.* 239.

So if he escape at any time after the surrender, before the return of the writ. *Mod. Ca.* 238.

If the plaintiff, or his attorney, be in court at the time of the surrender, he ought to declare his acceptance, or refusal to take him in execution, of which there shall be an entry upon the record. 1 *Rol.* 337. l. 15. *Hob.* 210. *Pr. Reg.* 66. *Cro. El.* 22. 1 *Leo.* 58.

If they are not in court, he shall be committed till the plaintiff or his attorney be summoned to make his election. 1 *Rol.* 337. l. 20. *Hob.* 210. 2 *Rol.* 367. *Mo.* 888.

If they are dead, a *scire facias* shall go against the plaintiff's executor, or administrator to make election. 1 *Rol.* 337. l. 25. *Per. Hob.* 210.

And whether the plaintiff, or his attorney, accept or refuse, shall be entered upon the record. *Hob.* 210. *Mo.* 888.

And such refusal does not bar the plaintiff of his execution by *capias ad satisfaciendum* afterwards. *Per. Hob.* 210.

(Q. 5.) By the Death of the Principal.

If the principal die before a *capias* against him, the bail shall be excused. *R. Hutt.* 47. *Mo.* 432. *Cro. El.* 597.

Vide post,
(R 5)

So if error be brought after judgment before a *capias*, and the principal die pending the error. *R. Hutt.* 47. *Dub. Lat.* 149.

So if the principal die before a *capias* against him be returned and filed, the bail shall be excused. 1 *Rol.* 336. l. 15, 25, 449. l. 49, 45, 53, 450. l. 15. *R. Jon.* 139.

But the death of the principal, after a *capias* against him returned *non est inventus*, and filed upon the record, does not excuse the bail, though he died before a *scire facias* against the bail, and if the bail had then brought in the principal, they would have been discharged. *R.* 1 *Rol.* 336. l. 15. *R. Mo.* 775, 6. *R.* 2 *Cro.* 165. 1 *Rol.* 450. l. 5. *Jon.* 139. 2 *Jon.* 228.

[If after *ca. fa.* returned *non est invent.* and filed, the principal dies before the return of the second *sci. fa.* bail are liable. *Glyn v. Yates*, P. 8 G. Str. 511.]

[After suing out *ca. fa.* bail cannot discharge themselves but by actual surrender. *D. Ibid.*]

So the death of the principal before judgment against him, is of no avail; for the bail shall not take advantage of the error in the first judgment. *Per Gawdy*; *Wray cont.* 2 *Leo.* 101.

[If principal dies before judgment could be had against him, proceedings on bail-bond shall be staid. *Barnes* 99.]

[But

[But if the cause could have been tried before defendant's death, (bail not being perfected) the bail-bond shall stand; for plaintiff might have entered judgment after defendant's death, by *fl. 17 C. 2. c. 8.*]

(Q. 6.) If the Debt be satisfied by the Principal.

Vide post,
(R. 6.) So if the principal pay the sum recovered against him, after judgment or before the bail shall be excused. *2 Lev. 212. Cro. El. 132, 233.*

As if he pay to the sheriff, being taken upon a *capias ad satisfaciendum*. *Dub. 1 Rol. 335. l. 45.*

So if error be brought and pending that, the principal pays the debt; the bail in error shall be excused though the judgment be afterwards affirmed. *Cont. 1 Rol. 335. l. 10.* If he release the debt. *Acc. post (Q. 7.)*

But if the principal after judgment pay a less sum in satisfaction, and the plaintiff accepts it, the bail are not discharged; for a less sum cannot be a satisfaction. *R. 2 Lev. 212. R. 1 Rol. 335. l. 50.*

So if there be judgment against *A.* in trespass in *B. R.* and judgment against *B.* for the same trespass in *C. B.* the bail for *A.* in *B. R.* upon a *scire facias* against them, cannot plead the judgment against *B.* and satisfaction thereupon. *R. 1 Rol. 335. l. 25.*

So it is no plea, that the principal has paid after judgment, if they do not shew a payment upon record. *R. Cro. El. 132.*

Otherwise if they plead payment before the day in the recognizance. *Cro. El. 233.*

(Q. 7.) If it be released, or discharged.

So if the plaintiff in the original action after judgment release the debt, and all judgments, executions, and demands to the defendant, the bail shall be excused. *R. 1 Rol. 336. l. 35.*

So if after judgment and error brought, and before judgment affirmed, the plaintiff in the original action release the debt to the defendant, and afterwards the judgment be affirmed; the bail in the writ of error shall be excused. *Semb. 1 Rol. 335. l. 20. R. 2 Bul. 232. 2 Cro. 401. Mo. 852.*

So if the sheriff release to the bail, after a bond by them for the defendant's appearance, this release is a good bar in an action upon the bond in the name of the sheriff. *R. 2 Vent. 131.*

But a release to the bail of all demands, before judgment, does not discharge them. *R. 2 Bul. 231. 5 Co. 70. b. Mo. 469. Cro. El. 579.*

So if there be an action by an administrator *durante minoritate*, and bail given to the administrator, and after judgment, the executor attains the age of 17; this does not discharge the bail, but the plaintiff may afterwards sue a *scire facias* against them. *R. 2 Lev. 37.*

[If

[If a bankrupt's certificate is obtained before the bail are fixed, they shall be discharged: if they are fixed before the certificate is obtained, they remain liable. *Wooley v. Cobbe*, H. 30 G. 2. 1 B. M. 244.]

[In *C. B. exoneretur* was entered though (*Semb.*) bail was fixed. N. B. notice, and no cause shewn. *Pasch.* 24 G. 2. *Barnes* 104, 105.]

(R) Proceedings against Bail.

(R. 1.) By *Scire facias*.

AFTER judgment against the principal, if he does not pay (R. 1.) the condemnation, nor surrender himself to prison, a *scire facias* goes against the bail. *Lut.* 1269, 1279. When it shall issue.

And debt does not lie upon the recognizance, but only a *scire facias* against the bail. *Ray.* 14. *Cont.* 1 *Rol.* 600. l. 15. but there error was brought. And afterwards *acc. R. in C. B. Trin.* 13 *Ann.* that debt does lie. *R. Mod. Ca.* 159. Debt was brought. 2 *Cro.* 45, 97. Vide in Pleader, (3 L. 1, &c.)

Yet after judgment against the bail in a *scire facias*, debt lies upon this judgment. *R. 1 Rol.* 600. l. 5.

But if a *scire facias* goes against the bail, before *capias* issued against the principal, and returned, it is error. *R. Cro. Car.* 481. 1 *Rol.* 333. l. 30. *D. Lut.* 1273. 4 *Leo.* 36. *R. Mo.* 432. *Cro. El.* 597. *Popb.* 186.

[If the *ca. fa.* is returned before the death of the principal, a *scire facias* may issue against the bail. *Str.* 717. *Ld. Raym.* 1452.

[If a *ca. fa.* against the principal is left with the sheriff before allowance of writ of error, and appears afterwards to be returned *non est inventus*, it shall be presumed to be returned after writ of error spent, and it is sufficient to ground *scire facias* against bail. *Simmonds v. Middleton*, P. 23 G. 2. 1 *Wilf.* 269.]

[The court will not examine whether the *ca. fa.* is actually returned and filed before issuing *sci. fa.* for if that was pleaded, the return might be filed at any time before replication. *Hunt. v. Cox*, M. 3 G. 3. 3 B. M. 1360. *1 *Black. Rep.* 363.]*

So if the *capias* does not issue regularly: As if it was above a year after the judgment, without a *scire facias*. 2 *Jon.* 96.

Yet it need not be mentioned in the *scire facias*, that a *capias ad satisfaciendum* has issued. *D. Lut.* 1273. *Mo.* 775. *Popb.* 186. *Semb. cont. R. acc.* 2 *Cro.* 97. *R. Lut.* 1281.

[It may be tested the day of the return of the *ca. fa.* *Stewart v. Smith*, P. 3 G. 2. *Str.* 866. *Ld. Raym.* 1567.]

And if a *capias* does not issue, the bail shall not be discharged, without writ of error. 4 *Leo.* 36.

Or by *audita querela.* 1 *Rol.* 309. l. 5. *Cro. El.* 597. *Mo.* 432.

So if a *capias* issues against the bail before a *scire facias*, it is error. *R. Cro. Car.* 561.

And

And though a custom be alledged, to charge the bail in execution upon the return of a *capias ad satisfaciendum* against the principal, without a *scire facias* against them, it is void. *R. Cro. El.* 185. 2 *Leo.* 29. *D. Pal.* 567.

So if a *scire facias* issues, before judgment against the principal, it is error. 2 *Leo.* 1.

And therefore, if the first judgment be a *videtur curia*, and not by a *confideratum est*, the *scire facias* against the bail is erroneous, for *videtur curia* is not any judgment. *R. Cro. El.* 145. 2 *Leo.* 1.

And though judgment be afterwards given against the principal, the judgment in the *scire facias* stands reversed. *Cro. El.* 215. 2 *Leo.* 2.

But error in the judgment against the principal, is not a cause for reversal of the judgment in the *scire facias* against the bail. 2 *Leo.* 101. *R. Cro. Car.* 481, 561.

And the bail cannot join with the principal in a writ of error. *Vide in Abatement*, (E. 15.) *R. Pal.* 567.

Nor can they have a writ of error, *tam in redditione iudicii*, against the principal, *quam in redditione iudicii*, against the bail, *et executionis superinde*. *Per 2 J. Jones cont. Cro. Car.* 481.

Otherwise, if the writ of error by the bail only, recites the first judgment, and assigns errors in the judgment against the bail only. *Cro. Car.* 481, 482.

And if the judgment against the bail be bad for infancy, &c. or other error in fact, the bail shall take advantage of it by *audita querela*. *R. Tel.* 155.

If the *scire facias* against the principal after judgment has only four days between the *teste* and return, and a *scire facias* be brought against the bail, proceedings shall be stayed, upon motion by the bail. 2 *Mod. Car.* 305.

[If after error is brought by the principal, a *scire facias* is sued out against the bail, the court will order proceedings to be stopt on the bail's consenting, if the judgment be affirmed, to surrender the principal, or give judgment on the *scire facias*. *Myer v. Arthur*, P. 7 G. T. 10 G. *Tucker v. Waller*. *Str.* 419.]

[But if the writ of error is not brought by the principal, while he may be surrendered by his bail, B. R. will not stay proceedings on a *scire facias* against the bail, pending the writ of error. But the house of lords may, pending error in parliament. *Everett v. Gery*, T. 7 G. *Aldridge v. Snowden*, T. 10 G. *Str.* 443.]

[The court will not stay proceedings against bail, pending error, till bail is put in upon the writ of error. *Hunter v. Sampson*, M. 1 G. 2. *Str.* 781.]

* A writ of error on the principal judgment will not hinder the suing a *capias* to charge the bail. *Lord Raym.* 342.*

* A *Ca. Sa.* returned after error brought and allowed, is regular to charge the bail. *Lord Raym.* 1259.*

[If the first *sci. fa.* bears *teste* the same day with the *ca. fa.* and bail have rendered principal after judgment, both *sci. fa.*'s shall be quashed. *Barnes* 95.]

But

But after a *scire facias* against bail, error brought of the principal judgment is not a *superfedeas* to the proceeding in the *scire facias*. R. 1 Rol. 371. Poph. 186.

[The court will not set aside judgment signed against bail, because error pending by the principal, *Fisher v. Emerton*, T. 8 G. Str. 526.]

[If there are fifteen days between the *teste* of the first, and the return of the second *scire facias*, it is sufficient. *Elliot v. Smith*, T. 13 G. 2 Str. 1139.] (R. 2.)
In what
manner the
scire facias
shall be
sued.

[A *capias ad satisfaciendum* may be taken out against bail, without any *fieri facias*, or return of *nulla bona*. *Ibid.*]

If bail in C. B. be taken by a judge in *Fleet-street*, which is in London and afterwards filed at *Westminster*, the *scire facias* issues from *Middlesex*. 2 Rol. 382. Hob. 195, 6. Sal 600, 564.

Or, from London. R. 1 Rol. 891. l. 20, 35. Al. 12. Hob. 196. Sal. 600.

But a *scire facias* upon a recognizance of bail in B. R. must be in *Middlesex*; for it does not bind, till filed. R. Sal. 600, 564.

[*Sci. fa.* on a bail-piece remaining in *Middlesex*, must be sued out in *Middlesex*, though the original cause of action was in London. *Bond v. Isaac*, M. 31 G. 2. 1 B. M. 409.]

It shall always be entered as taken in court. Sal. 564.

So there be bail for two defendants in several terms, there shall not be a *scire facias* against them jointly. Lut. 183.

But upon motion they may be filed both of the same term. *Ibid.*

If there be bail in York, and transmitted to *Westminster*, the *scire facias* may be in one county or the other. R. Lut. 1287.

[Where the *capias* is in another county, and inrolled in *Middlesex*, the *sci. fa.* may be in either county, but where the *capias* is in *Middlesex*, the *sci. fa.* must be there. *Barnes* 96, 207. **Vide* 2 Bl. Rep. 769.*]

If there be bail in C. B. and afterwards the judgment is affirmed in B. R. the recognizance shall be removed thither by *certiorari*, for the *scire facias* must issue out of the court where the judgment was given. R. 4 Mod. 134. *Vide Pleader*, (3 L. 3.)

The *scire facias* ought to pursue the recognizance; and therefore, a variance from it is error: as, if it mistakes the sum. R. Cro. El. 855.

So it ought to pursue the judgment. *Vide Pleader*, (3 L. 3.)

[It is sufficient if it says, *although* plaintiff recovered judgment, without averring he *did* recover. *Barnes* 431.]

[So though recognizance was at the suit of A. and the judgment was A. junior. *Ibid.*]

And if a recognizance be taken before commissioners, &c. it ought to shew how it was transmitted, and the record. Lut. 1283.

So it ought to pray execution; and therefore, if after, *quare executio*, the words, *fieri non debet*, are omitted, it is bad. Lut. 1282.

So, if there be a recognizance upon an original in the county of Y. and he afterwards declares in the county and city of Y. and has judgment

judgment upon it, the bail shall not be charged; for though he may change the county, yet he thereby loses the bail. *R. 3 Lev. 235.*

But if there be a recognizance of bail upon a *clausum fregit*, and the action is by an executor or administrator, whereby it does not appear, but that the bail was in an action in his own right, yet it will be well; for it is the usual course to take bail upon the *clausum fregit*. *Lut. 1281.*

So if it pursues the recognizance, it is sufficient: as, if *A.* and *B.* are bail for *C.* and *D.* only, in an action against *C. D.* and *F.* and the *scire facias* says, that *C.* and *D.* have not satisfied the judgment, it is sufficient, though it does not say, that *F.* has not satisfied; for the bail was only for *C.* and *D.* and it is enough to shew, that they have not satisfied; and if *F.* has paid, it shall be shewn on the other side. *R. 2 Rol. 276. l. 35.*

So, if it does not say, that *C. & D. nec eorum aliquis* has satisfied; for if either has paid, both have satisfied the judgment. *R. 2 Rol. 276. l. 35.*

So it is not necessary after recital of the recognizance to conclude, *prout patet per recordum*. *Lut. 1282.*

*The court on motion will set aside proceedings against bail in *scire facias*, because they were summoned only an hour on the return day before the court rose; and the sheriff's return of *scire faci* does not stop them from saying, that they were summoned so late on the return day, that they could not bring in their principal before the rising of the court. *2 Term Rep. 757.**

(R. 3.)
Pleas to a
scire facias.
Surrender
of the prin-
cipal.

To a *scire facias* the defendant may plead, *that the principal surrendered himself in discharge of his bail*. *Vide ante, (Q. 2.) Adm. 3 Lev. 152.*

That a capias ad satisfaciendum issued against him, upon which he was taken in execution. *Lut. 1270.*

And he need not say, *that he continued in execution*; for the bail will be discharged, if he was ever taken in execution. *Lut. 1273.*

And to this the plaintiff ought to reply, *that non est inventus was returned upon the capias ad satisfaciendum*, and traverse, that he was taken upon it. *Ibid.*

Or, *that another capias ad satisfaciendum was returned non est inventus*, and traverse, that this writ issued. *Ibid.*

Or, if the defendant pleads, a *capias ad satisfaciendum* returned *non est inventus*, and a taking upon a *testatum capias ad satisfaciendum*; he may reply, *that no such testatum capias ad satisfaciendum issued*, without a traverse. *R. Lut. 1273.*

*Where a *non est inventus* is returned to a *capias ad satisfaciendum* against the principal, the bail cannot plead a render, but must be relieved by rule on motion. *Lord Raym. 156.**

And the defendant may plead a surrender, without saying, *that it was before a capias against the principal returned*; for if it was not, it shall be shewn on the other side. *R. Jon. 139.*

But the defendant cannot plead, *that the plaintiff had the principal in execution in the stannary court, whereby he could not surrender him*;

in; for the bail might remove him by *habeas corpus*. R. Mo. 400. Per two Judg. 2 Rol. 136.

So, if he pleads a surrender, he ought to conclude, *prout patet per recordum*. R. 3 Lev. 152.

So he cannot plead a surrender in debt upon a recognizance, yet he shall have advantage of it. 1 Sal. 101. Vide ante, (Q. 2.)

[Surrender shall be to the court, whither the proceedings are removed, though the recognizance is to render to the inferior court. *Freshwater v. Eaton*, E. 3 G. Str. 49.]

So the bail may plead, *that no capias ad satisfaciendum issued against the principal secundum cursum curie*. Lut. 1285. Tho. 282. (R. 4.)
Vide ante, (R. 1.) No *capias ad satisfaciendum* against him.

* But a *capias* taken out three years after the judgment will maintain the *scire facias*. Lord Raym. 1097.*

* And though a *capias* that has not eight days between the teste and return be irregular; yet it is sufficient to maintain a *scire facias* against the bail, where it is not set aside. Lord Raym. 1177.*

And the *capias ad satisfaciendum* ought to have eight days between the teste and return; otherwise, upon motion, it shall be superseded; but they shall not be helpt upon demurrer. R. Sal. 602.

But if a *capias ad satisfaciendum* issued, it is well, though it was not delivered to the sheriff before the *scire facias*. R. Lut. 1287.

So, if it issued, it will be a departure, if the defendant rejoins, that there was error brought before the return and filing. R. Mod. Ca. 139.

So, if it issued, and was returned, though the return was not filed before the *scire facias*, it is good. R. 1 Lev. 225. Semb. 2 Cro. 98.

So, if it be tested after the year, and no *scire facias* appears. R. Mod. Ca. 304.

So he may plead, *that the principal died before a capias returned, and filed against him*. R. Hutt. 47. Vide ante, (Q. 5.) Acc. Death of the 2 Leo. 101. Moy. Precedents 177. R. Jon. 29. 139. Tho. principal. Ent. 280.

But the defendant in his plea ought to shew the time of his death. R. 2 Cro. 97.

And the court requires, that the defendant do swear to his plea. 2 Leo. 101.

And if there was an *alias capias*, the plea shall say, *that he died before the return of any capias*. R. 5 Mod. 167.

If the plaintiff replies to such a plea, he ought to shew when the *capias* issued, and traverse the dying before. R. Carth. 4.

So the bail may plead payment, or satisfaction of the judgment against the principal. Vide ante, (Q. 6.) R. 1 Rol. 336. (R. 6.) Satisfaction by the principal.

As, that the defendant was taken by a *capias ad satisfaciendum*, and detained quousque satisfaction, prout per breve & retornum, &c. *Tho. Ent.* 282.

But payment is no plea, unless he alledge payment upon record. *R. 2 Leo.* 213. *R. Cro. El.* 132. *Cont. quoad* the bail, though not *quoad* the party himself. *Cro. El.* 233.

Unless he alledge the place of payment. *R. 1 Mod.* 24. *1 Vent.* 49.

* Payment by the principal before the return of the second *scire facias*, cannot be pleaded, the relief must be by rule upon motion. *Ld. Raym.* 157.*

(R. 7.)
Demurrer
for vari-
ance.

So upon a *scire facias* against bail, if there be a material variance in the recognizance upon record, and the recital in the writ, the defendant may demand *oyer*, and afterwards demur. *Lut.* 1280.

What will be a variance. *Vide ante*, (R. 2.)

(R. 8.)
Nul tiel re-
cord.

So, he may plead *nul tiel record of the recognizance aforesaid*. *Tho. Ent.* 285. *Thef. Brev.* 265. *Off. Brev.* 281.

So, if the *scire facias* varies from the judgment, the defendant may plead *nul tiel record*.

[A *scire facias* against bail is never amendable. *Grey v. Jefferson*, P. 15 G. 2. *Str.* 1165.]

[A *scire facias* on recognizance on error, need not set out the condition of recognizance which is not incorporated, but subscribed by way of defeazance; in recognizance on *capias* otherwise. *Barnes* 93.]

(R. 9.) By Action of Debt.

So debt lies upon a recognizance given by bail. *Vide Debt*, (A. 3.)

And the plaintiff may declare against all the bail jointly, or each severally. *2 Mod. Ca.* 295.

* In debt on the recognizance, the bail shall have eight days after the return of the writ, to render the principal; and if there be but four in the term after the return of the writ; he shall have four days in the following term. *Lord Raym.* 721.*

[The writ must be served four days before the return. *Barnes* 62.]

[There must be fifteen days between *teste* and return of *ca. sa.* to ground proceedings against bail. *Barnes* 76.]

[*Ca. sa.* returnable pending error, is not foundation for proceedings against bail. *Barnes* 83.]

[On error brought, proceedings on action on the recognizance shall be staid, without defendants giving judgment; for that would preclude surrender of the principal. *Barnes* 82.]

(R. 10.) Judgment.)

The judgment upon a *scire facias*, or debt brought upon a recognizance against bail shall be, *quod querens habeat executionem*.

But the judgment against the bail shall not be, *quod dampna recuperet occasione dilationis executionis*, though the *st. 8 & 9 W. 3.* gives costs to the plaintiff in a *scire facias*. *R. 1 Sal. 208.*

(R. 11.) How Execution shall be.

If there be judgment against the principal, and after a *capias* against him returned, judgment also against the bail, the plaintiff may sue execution against the principal, or against the bail. *R. 2 Cro. 320.*

And if he has one of the bail in execution, he may afterwards sue execution against the other. *R. 2 Cro. 320. 2 Bul. 68.*

And though there was a *scire facias* against both, he may sue execution against one only. *R. 1 Sid. 339.*

And if he has execution against the bail, but has not a satisfaction, he may afterwards have execution against the principal. *Semb. cont. 2 Cro. 320. R. acc. 2 Cro. 549. R. 1 Sid. 107. Cont. 2 Bul. 68. Vide Execution, (H.)*

But if the principal be in custody, he shall not have execution against the bail. *2 Cro. 320. R. cont. 2 Jon. 75. 1 Vent. 315. no judgment. 2 Mod. 312. but there it appears, that only one of the principals was in execution. 2 Lev. 195.*

Or, if the principal ever was in custody. *Lut. 1273.*

Yet, if there be execution first against the bail, he may afterwards take execution against the principal, and have both in execution together. *R. 1 Vent. 315.*

Execution against the bail upon a recognizance in *C. B.* being for a sum certain, ought to be by *fieri facias*, or *elegit*. *2 Cro. 450.*

If there be a *scire facias* and judgment against all the bail, execution may be against one of them, without the others; for it follows the nature of the recognizance, which was joint and several. *R. 1 Lev. 226. Vide Execution, (H.—I. 1, &c.)*

So, it may be against the person of the bail by a *capias ad satisfaciendum* as well as against his goods. *R. 1 Lev. 226. to be the course of the court in B. R. Acc. 1 Rol. 897. l. 35. 2 Cro. 450. Vide Execution, (C. 9.)*

[*A ca. fa.* lies against bail on a writ of error. *Goodchild v. Chaworth, H. 2 G. 2. Str. 822.*]

But a *capias ad satisfaciendum* does not lie against the bail. *Litt. 238. Semb. 1 Rol. 600. l. 5. R. (that it does not lie, where there is a judgment in a scire facias upon a recognizance in C. B. 1 Rol. 897. l. 40. 2 Cro. 450, 1.*

So, it does not lie against bail upon a recognizance in an inferior court. *R. 1 Rol. 897. l. 45.*

So, it does not lie against bail in *B. R.* upon a writ of error in the *exchequer*; for this is out of the course of the court. *R. 1 Rol. 898. l. 5.*

B A I L.

If there be execution of the lands of the bail, this relates to lands which he had at the time of the recognizance made, though they are aliened afterwards.

And this in *B. R.* as well as in *C. B.* *Per two J. Hought* cont. *Poph.* 132. 2 *Cro.* 449.

B A I L I F F.

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T H E

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